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Supreme Court of the U. S.

October Term, 1887.

No. 212.

FROM CALIFORNIA.

JAMES A. ROBINSON AND WIFE, ET AL.,

vs.

JAMES H. FAIR.

JOHN A. CAMPBELL,
For the Plaintiffs.

JOHN MURPHY & CO., PRINTERS, BALTIMORE.

Supreme Court of the U. S.

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FROM CALIFORNIA.

JAMES A. ROBINSON AND WIFE, ET AL.,

vs.

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I.

A STATEMENT OF THE CONTROVERSY AND PARTIES.

The plaintiffs sue at law to recover lands within the city of San Francisco, claimed by descent from Horace Hawes, their father, who died in that city the 12th of March, 1871, intestate, and was then the owner of this property. The defendant does not contest the facts, but avers that this land was divided under decrees and orders of the Court of Probate in San Francisco in the spring of 1875; that the proceedings were conducted by the administratrix of the estate, who was the widow of Horace Hawes, the intestate. The heirs at law of Horace Hawes, under the code of California,

were his widow and two children—a son and a daughter: the son sixteen years of age, and the daughter ten years of age, in 1875. The lands in controversy were allotted to the widow, and sold by her shortly after to J. C. Flood, and by him were sold to the defendant. This suit is for the undivided interests of the children, and was commenced by them. The share of the widow is not involved, and she is not a party. The minor children contest the validity of that partition, and aver that the proceedings as to them are inoperative.

II.

Proceedings in the Probate Court by the Administratrix.

The administratrix (Mrs. Hawes) filed her petition as administratrix the 18th of February, 1875, in the Probate Court of the county of San Francisco, and filed the final account of her administration. She asked the Judge to examine and approve it, and to absolve her from any further account. She further asked that she be allowed to *distribute* the property which had been subject to her administrative control. In California all of the real and the personal estate, rents, and profits are subjects of administration, and pass into the control of the administrator. After a final settlement he loses all authority, and cannot sue or be sued respecting the estate. 24 Cal., 491; 38 Cal., 392; 54 Cal., 121; 21 Cal., 202, 209, 346. The petition for a *distribution* was a consequence of the final account.

The administratix annexed a schedule of the real estate owned by the decedent, which she had control over as administratrix. She states that she had greatly overdrawn her account, and that this should be taken into consideration in the distribution and partition of the estate, which are the objects of the application.

III.

Proceedings in the Probate Court on the Petition.

Upon the submission to the Court of the petition of the administratrix, the Probate Judge made an order that there should be a publication of a notice in a city paper designated once a week for four successive weeks, for all persons interested in the estate of Horace Hawes to appear in that Court on the 23d of March, 1875, to show cause whether the final account should be allowed; also why a decree of distribution should not be made of whatever estate the administratrix possessed; and then why a partition should not be made among the heirs at law of the intestate.

These heirs were the widow and two minor children of the decedent, Horace Hawes. The petition revealed that the personal estate had been comparatively of small value, and been set apart for the widow, except a law library reserved for the son. She stated that she had overdrawn her own account for the purpose of liquidating the estate, and balances would have to be adjusted in the partition and distribution. She also speaks of the value of the real property, and there would be difficulty in making a partition; and her willingness to take one parcel and to pay the necessary owelty to remove any inequality. Record, pp. 18–24. No citation nor summons was served on these two minor children, each of whom was entitled to one-third of the entire property.

The order of publication was put in the paper designated in the order of the Court and the affidavit of the publication is contained in the Record. Record, pp. 45, 46. The order does not describe the persons interested, nor the heirs at law, nor call for any guardian *ad litem*. There is no proof of a personal service on either nor a personal appearance of either of them or by any guardian.

The cause was not taken up until the 29th of March, 1875, by the Probate Court.

Proceedings in the Probate Court on and after the 29th of March, 1875.

IV.

The petition filed by the administratrix is signed and sworn to in her civil relation. The Probate Judge caused an order to be filed that Mr. C. H. Sawyer, an attorney of the Court, was appointed to represent the minors in the proceedings of distribution and partition of the estate, and in all other proceedings where the heirs are required to be notified. This order was not made upon the motion of any guardian or guardian *ad litem*. The order was made in open Court and is signed by the Judge. Record, p. 19, Exhibit C. The Probate Court proceeded with much rapidity. All of the acts and proceedings of the administratrix were approved and confirmed. of the account allowed

A decree of distribution of the entire estate of Horace Hawes was made and executed. The administratrix declared the property in lands which had remained in her control as the administratrix, was delivered over to the heirs according to their title as heirs; each was to have and receive it discharged from her title of administratrix. Record, pp. 19–23, Exhibit D. After this delivery of investiture and seisin of the entire succession to the heirs upon a final settlement the administratrix terminated her connection. On this day there had been settlement and distribution. The heirs respectively were tenants in common as heirs at law. The record opens another scene after the decree of distribution had been recorded. "Immediately after the decree distributing said estate, J. C. Bates appearing for the petitioner, and Charles H. Sawyer appearing and representing the minor heirs of the deceased,

and upon consent in *open Court of all parties interested* to the appointment of James L. King, Sole Commissioner, for the purposes of partition of the estate of the deceased Horace Hawes." Record, pp. 23, 24, Exhibit E. The signification of this order is sufficiently clear when we resign the superlatives. Mrs. Hawes, who is the widow of Horace Hawes, and the two minors, Horace Hawes and Caroline Hawes, are the parties in interest.

Mr. Bates had represented her as administratrix, and when the decree of distribution was executed she retires upon the title of heir at law of one undivided third part in actual possession. The children were also possessed by the surrender made in the decree.

It must be observed that the administratrix, *merely as such*, has conducted this proceeding to the announcement and record of the decree of distribution. Her title derived from the statute is a possessory title, for mere purpose of administration.

An administratrix without other title has no estate to dispose of in partition or division. The action of partition and division is a real action, and is supported by an estate in the thing to be divided. The administratrix had abdicated her office by the decree of distribution and the consequent surrender of that estate. These conditions became ostensible at the time that this decree was promulgated in the Court. Thereupon, we are told, IMMEDIATELY Messrs. Bates and Sawyer [redacted] hastened to place on the record that "upon consent of all parties interested to the appointment of James L. King Sole Commissioner for such purposes, *i. e.*, partition and division." It is plainly stated in the petition of the administratrix, which is the ground of all the procedure, that these minor children had not attained their majority, and were not competent to conduct a suit at law.

As a matter of fact, the appointment of Mr. Sawyer to appear and to make such an order does seem to us to be perfectly irregular, and insupportable. The Probate Court immediately ratified the

agreement, and the commissioner proceeded to perform the duty. The statute of California requires three referees to be appointed.

The commissioner, King, on the second of April, commenced his work, and was attended by the attorneys, Bates and Sawyer—none other mentioned or hinted at. The report was completed the 13th of April, and the report was confirmed in the Probate Court the 19th of April. The commissioner allotted the fifty vara lot to Mrs. Hawes, which she mentions as desirable to her in the petition filed by her. This lot was sold by her to James C. Flood the 24th of May, 1875. Record, p. 35, Exhibit I.

I.

Conclusions upon the Law and the Matters of Fact.

There is no contest made in this suit with the judgment of the Probate Court on the final account, nor upon the decree of distribution. The Probate Court had jurisdiction of the subjects connected with the administration, the payment of the debts, and the liberation of the succession from the creditors so as to be returned to the heirs at law. The action of the administratrix in the matters of partition arises out of the community of right and possession found to exist when the decree of distribution was recorded. Three persons of the same family and holding by descent as members are the parties.

The *actio familiae erciscundae* of the Roman law as its name denotes was framed to effect the division of an inheritance among the family. The shares were equal and the necessity for a division is not apparent. The law of dower does not exist in California. The state of the minor children was that described by the learned Scribe, the Apostle Paul. "The heir so long as he is a minor differeth nothing from a servant, though he be lord of all. But he is under tutors and curators until the time appointed."

24 Pothier, Pandects, sect. 1213, p. 185.

The record contains no reference to any guardian for these children, even for the defence of a suit in which the entire succession of Mr. Hawes was the subject of the discussion, and all of the members of the family interested. In the Roman action above mentioned the tutor alone could have appeared for the daughter; the son would have a curator. The word implies protection, competency, oversight, defence. These they supply: *Vis ac potestas in capite libero ad tuendum eum quæ propter ætatem suam sponte civili dicta et permissa.*

So, *Tutoris præcipuum est officium ne indefensum pupillum relequat.* So, *Tutor personæ non rei vel causæ detur.* The English word is guardian, watchfulness, safeguard, wardenship—the minor is a ward. The codes of California have an exact expression of these conclusions in the forms of rules, of action and procedure. A minor in a California Court *must* appear by his general guardian if he has one, or one must be appointed by the Court in which the action is prosecuted. Art. 372, C. P. 16, Cal. R. 474; 32 Cal., 120, 42 Cal., 484. The appointment of an attorney without a guardian gives no jurisdiction over the minor heir, 33 Cal., 45.

II.

At the call of this cause in the Probate Court the 29th of March, 1875, the first inquiry to be made by the Judge of that Court was, who are the parties to the cause, and by whom represented? The cause on the part of the plaintiff was the settlement by the administratrix of her final account. The parties in interest are a widow, who is administratrix, and two minor children of the intestate, and these are equal co-heirs. The administratrix has filed her account, and proposes to make a distribution of the estate among the three heirs and then to have a judicial partition.

No citations have issued for the heirs; there has been no sum-

mons to the minors; no guardian nor guardian *ad litem* has been appointed. There had been no attorney employed before the 29th of March, 1875. The Probate Judge made a choice and assigned him to duty. The administratrix had an account to render of a responsible administration of the inheritance transmitted by a deceased father to his family. This father relied upon the laws as a safeguard to protect those who were disabled as well by the laws as their natural infirmity from managing their own effairs. There was no necessity for any change in the state of the affairs of the estate for a sale or a partition.

The statutes and the jurisprudence of the Courts afford no encouragement to a hasty, perfunctory, experimental administration. We have cited the 372d Article of the Code of Procedure as a landmark in this system of administration, which serves to hinder any mischievous deviation which should have precluded any departure from the right way.

III.

On the morning of the 29th of March, 1875, it was entirely manifest that no general guardian was in attendance for the children of Mr. Hawes.

The learned counsel for the defendant in the suit, in their brief filed in the Circuit, asserts that the administratrix, in addition to the office she was then discharging in the Court, also filled the office of guardian for the two minor heirs. The two offices were plainly incompatible in respect to the work to be done on that day. The administratrix was prosecuting the suit to accomplish an object personal to herself. She sought a settlement, a discharge from the responsibilities of the administration. No guardian represents the children in this settlement. Appointment of attorney without a guardian does not give jurisdiction of the heirs. 33 Cal., 45.

A guardian who is administrator cannot represent the heirs on a petition to sell. A guardian *ad litem* must be appointed in such a case. 33 Cal., 45. The cause of the decision is that the interest may collide.

When it comes to a cause of partition the necessity for an independent representation is recognized. No Court would be allowed to appoint an administratrix to settle the final account, the decree of distribution, and to make the partition. This whole estate was disposed of in the absence of the guardian or a guardian *ad litem*. The attorney (Mr. Sawyer) was appointed, probably upon a suggestion from the Court without consultation with any one who had considered what a guardian's duty was in a case before this Court. The Court called for the petition of the administratrix after the decree of distribution was made and recorded, and the matter ended. This Court has said: "In all suits brought against infants whom the law supposes to be incapable of understanding and managing their own affairs, the duty of watching over their interests devolves, in a considerable degree, upon the Court. They defend by guardian *ad litem* to be appointed by the Court who is usually the nearest relation *not concerned in point of interest in the matter in question.*" * * * "The answer of the infant defendants in the original proceeding assigned by their guardian and not sworn to. It consents to the decree for which the bill prays. This arose upon a bill of review filed to set aside the decree." This was successful. The case before this Court at this time is that minors are described as such in the petition filed. The Court knew that a guardian was not before the Court as a party, neither is their citation or service upon them. An attorney at the bar was designated to represent them.

Bank of U. S. *vs.* Ritchie, 8 Pet. 128.

2 Spencer Equit..
14 Ch. D. 630
8 Ch D. 1

In a case of partition, where there are a number of minor heirs, each one of them should have a separate guardian.

Gasson *vs.* Palfrey, 9 La. Ann. 560.

Infants, idiots and lunatics are incapable by themselves of defending a suit as they are of instituting a suit. They must defend a suit by a guardian who is appointed by the Court and is the nearest relation not concerned in interest in the matter in question.

86 Rule in Eq., S. C.
Story's Eq. plead., section 70, 45 Wis. 61.
1 Danl. Ch. Pr. 161–2 and notes.
2 Paige Ch. R. 304.
Bennett *vs.* Hall, 89 Ill. 72.

The Statutes of California echo the opinion and rules established in this Court. The Article 372 of the Code of procedure is an abstract of the rule which was provided in this Court more than a half of a century ago and was soon incorporated among the permanent rules of the Equity system of the Court and the country. A more expansive rule just here might be an act of a *parens patriæ*.

IV.

Among the nations on the Continent of Europe, there is in use a council to be composed of near relations or friends of the family who shall be consulted upon any proposal to sell the real property, or to borrow money, or apply for a partition. The law is in force in Louisiana.

The actions of partition among cotenants and the family, and the identity of boundaries, came to us from the Roman law. The form of the writ *de partitione* is preserved in the *Natura Brevium*,

and Lord Hale's annotations show that actions were brought in the earliest time of the year books.

The ordinary writ of partition was used in London, and claimed to be derived from a custom of that city. The common law action has been abolished among the latest changes. In California, the action is regarded as equitable in its character. 56 Cal., 26; 59 Cal., 262. It seems to be indivisible, and that all parties in any manner interested must be made parties to the suit.

The Circuit Court in the special findings (Article XII) records that immediately after making and rendering of the decree of distribution, the Probate Court made and entered its decree ordering partition of the real property of the estate of Horace Hawes deceased, and appointed James L. King sole commissioner for that purpose. Record p. 23, Exhibit E. On the second of April after, King received his warrant of appointment with the consent of the two attorneys.

V.

The real property of Horace Hawes was, at this moment, in a state of indivision. The administratrix by the fulfilment of the decree of distribution, in the decree itself left her, without that occupation. Three independent owners had received her recognition of their right, and declared that she had delivered the property itself. The widow, and the minor children received their shares by the terms of the decree of the Court, the attorneys and Court being parties. The action of partition was now called, and the parties were changed. The administratrix filed the petition as administratrix, and settled her accounts; she then proposed in open Court that the decree of distribution should be promulgated and then that the rights of the widow, and the two children—the heirs at law—in the land belonging to the estate of Horace Hawes should be now considered with reference to a partition to each of

them of his or her share. The proposition is for the first time placed in any distinct form in the records of the Court. The heirs were equal in right in some hundreds of thousands of real estate. Two of these owners were then minor children. In such a case, the law was that they should have a guardian.

The record shows that the proposition to place the partition of the property in the hands of a single commissioner, the proposition comes from the attorney of one heir who had finished her administration and as heir asked for partition at this time.

No guardian, nor guardian *ad litem*, had yet appeared. No inventory and appraisement is shown as part of the petition made to the Court to illustrate or to explain it. The administratrix has a certain interest distinct from that of the others. The others have an interest but they cannot assert that interest. The statements contained in the petition would furnish sufficient evidence to exclude the administratrix from being the guardian. The general guardian, if she had been the same person who was administratrix, had legal rights and interests which might collide. It was an interest that the Court would notice.

A guardian *ad litem*, though a near relation, is not selected if he have an interest in the question. In California a general guardian for an heir might contest the administration account. The guardian could make an appeal for the order of distribution. California confers power upon the guardian because of its desire to take care of the ward.

VI.

The powers of the administratrix to make a partition of the real property upon the methods adopted in this cause we do not recognize as valid or as right.

In respect to the partition of the real property these heirs have an equal interest, they have a separate and distinct right.

Were the two children of Horace Hawes—minors—represented *legally* according to the laws of California in this cause before the Probate Court prosecuted by the administratrix? The property in the course of partition is the subject of administration. Each one of the heirs of law has a right to use and enjoy and receive the fruits of the land and to gather them for the community.

But then when the community is to be dissolved and accounts settled on allotments made there are alienations, exchanges, claims and counter-claims. The petition of the administratrix communicates enough to show that it would have been proper to have a guardian—proper in this case, proper in every case. No Court is more exposed to crafty and overreaching enterprises than a Probate Court in a city like San Francisco. An active, alert, covetous, speculating community—a city that requires some generations of people to make it steadfast and secure.

VII.

The functions of the administratrix ended with the decree of distribution. The judgment confirming the account and the decree of distribution was a consummation. 36 Cal., 277; 54 Cal., 7.

It was after this consummation had been fully attained by the registry of that decree, that the *consent order* contained in the Exhibit E, which designated King as the only commissioner, was made by the two attorneys who had coöperated since the morning of that day with framing the decree relative to the final account, and the distribution made of the personal and real property. The Code of California allows of partition where there is a community of interest among parties in real property. The method of proceeding requires parties, the exhibition of titles and the parties are to be made known to the Court and must have notice. Persons

unknown may be called in by publication. Where the parties are *sui generis* they may agree to such a form of partition as may be agreeable.

The case presented in this instance is *sui generis.*

The Probate Court convenes at 11 a. m.

The Probate Judge called the case, and learns there are minors without a guardian. A member of the bar is called in and in a few hours the work is done. A partition is to be made of large property. A consent order is made, and in a few days the commissioner and the attorneys despatch the work. The Statute of the State on the subject is dispensed with.

The Statute of California prescribes three persons as the number of referees proper. Here are infants without a guardian before the Court. The infants, we may very safely conclude, were not before the Court in person or by any guardian.

We present an extract from a civilian of great rank for its appositeness to the question that arises here. "If the parties desire to make a provisional partition, the tutor or the emancipated minor may perform acts of administration, such as the sale of the fruits, and make contracts relative to their division which relate to the care or enjoyment of the property—that is a provisional partition. But when the parties become capable they may require a definitive partition."

This case is put by this jurist: suppose that the tutor or the minor emancipated should make a definite partition—a partition designed to be permanent. The tutor or emancipated minor cannot consent availably to proprietary acts unless they conform to all the formalities required by law. A partition by agreement, and not according to law, is not permanent. A person not capable cannot validly consent to acts except under the restrictions imposed by law. As to the acts of enjoyment and the disposition of fruits, but as a transfer of property it is of no validity.

VIII.

The interposition of King and Sawyer displays an appearance of authority without the reality. The Code of California declares that the minor must be represented by a guardian appointed by a competent Court having jurisdiction of person and subject. The minor must know who is appointed. The Code does not mention a lawyer or two lawyers as suitable to appoint commissioners for minor children. A partition from its nature is involved in difficulties even when the members of the same family are concerned. A spirit of speculation is insinuated, and a desire for lucre becomes manifest. Who is there to guard the minor children? Who to defend the wise counsels which a father may have left.

The wisdom of the authors of the laws and of the jurisprudence of the State is deposited with the Courts to be applied with unwearied diligence and inflexible firmness. The condition of the plaintiffs in this case, that they could not bind themselves to convey their title to their father's estate, in this land; they were not competent during their minority to convey a right in their land or to make a partition without a resort to the Court—an amicable partition, so to speak. The comment on this case is:

'This amicable partition by guardian is not provisional but definite—a *division of the property.* This agreement is not valid. Neither the tutor nor the emancipated minor can consent availably to acts of transfer of property only by conforming to the formalities prescribed by law.'

2 Mourlon, Repetitions écrites sur le Code, pp. 178, No. 353.

The case before this Court is that of a partition made by an entire stranger to the minor. A lawyer sauntering in the Court room may be called to represent a minor. No lawyer thus sum-

moned could properly consent to deviate from the plain and trodden footmarks the Codes have commanded. The law writes down the rules for him to follow. The Code does not insinuate any procedure like this.

The great writers on jurisprudence would say: If a guardian should agree with the coparcener to make a division without a judicial sanction, that he had no authority, and it is null and void.

The aim of the legislator is to place the minor upon the same conditions of equality in every particular in the daily experience and habit of administration. To supply every deficiency; to have in safeguard against the crafts and deceits which attend upon it. The practice of inventories and appraisements are resorted to, and the indisposition to obtain a division during a minority because of the expense. The civil law as well as the chancery law does not allow a guardian or a tutor. The tutor must be authorized by a council of the family when he proposes to commence a suit for immovable property or to acquiesce in a suit commenced against the minor. The reprimand of this Court to the proceedings in the case of the Bank *vs.* Ritchie, we have cited, are strictly applicable to the Probate Court in California. They show an accord with that we have cited. The report of the commissioner, King, was made the 13th of April, 1875, and confirmed the 19th, apparently, without remark of any kind.

The Jurisdiction of the Probate Court.

I.

The Courts of Probate in England followed the Norman Conquest and an ordinance of the conqueror William himself. This ordinance directed that no Bishop nor Archdeacon should for the future hold pleas relating to ecclesiastical matters in the county or

Hundred Court, but that all such pleas should be wheresoever he should appoint, according to the canon and ecclesiastical laws. He prohibited all lay persons from interfering with such matters. To this ordinance the civil jurisdiction of the ecclesiastical Courts throughout that kingdom is to be ascribed. At the assemblies and councils called by them for public purposes, and besides for judicial proceedings, the clerical members participated and were his chief advisers.

1 Spence, Eq. Jurisd., 101–2.
3 Stubbs, Const. H., 339–46.
2 Glasson, Droit et Inst. of Ang.
1 Gneist, Const. An., 231–2.

The Courts must have been much advanced, for the Synod of Canterbury considered *de puniendo advocatos et procuratores garrulos.* They even punish *Arbitrio judicis, et si Super hoc incorrigibiles maneat a consistorio perpetuo suspendatur.* These Courts had the jurisdiction of the Roman Praetor in the matter of wills; had their custody and impressed the seal of *Probatum est.*

The probate jurisdiction of the ecclesiastical Courts continued until the year 1857, when they were superseded by lay tribunals which superseded them. In the last modification of the organism of the Courts at Westminster, these Courts form one of the Chambers of the Chancery. The suit by the administratrix commences with a petition which announces that she desires a settlement of her final account, a distribution and a partition. The Article 1634 of the Code provides in respect to a final account mentioned before a final settlement, and the estate be ready for distribution, the notice of the settlement must state these facts, and must be served, or published, or waived in the same manner as provided in section 1539 of this Code relative to sales of property; and on confirmation of the final account, distribution and partition

of the estate to all entitled thereto, may be immediately had without further notice or proceedings. If from any cause the hearing of the account, or the partition or distribution be postponed, the order postponing the same to a day certain is notice to all interested therein.

The Article 1539 is: "The copy of the order to show cause must be personally served on all persons interested in the estate, any general guardian of a minor so interested, and any legatee, or devisee, or heir of the decedent, provided they are residents of the county at least ten days before the hearing the petition, or be published four successive weeks in such newspaper as the Court or Judge shall direct. If all persons interested in the petition for the sale, or signify in writing their assent thereto, the notice may be dispensed with and the hearing may be had at any time." The Article 1688 supplies the addition, "The order or decree may be made, on the petition of the executor or administrator, or of any person interested in the estate, but notice must be given or waived unless distribution is made, or the time for making it is fixed by order of the Court at the time of the settlement of the final account."

The distribution of the estate was the recognition of all of the rights of the individual heirs in the property, but such a distribution discharges the estate from the paramount rights upon the estate which the administratrix had for administration. 36 Cal., 277; 54 Cal., 7; 53 Cal., 451.

The introduction as the last act in the course of proceeding of the partition of the lands of the succession is a great incongruity with that which preceded. The administratrix had performed her functions in the administration of the estate. The heirs now take their independent control of their own property. All of these persons are interested in determining which each shall have and which shall receive the most favorable allotments. There are inquiries to

be made of locations, of titles of parties interested, whether all proper parties are here. Before any word has been spoken on the subject the two attorneys, the representative of the administratrix, and who had conducted the action of the administratrix to this stage. He appears still for the same person who now as an heir claims partition.

Mr. Sawyer had been appointed in an earlier hour of the day to represent the minor heirs, and in the order of appointment is designated as an attorney of the Court.

We are not informed that the children were present in the Court or had been. Mr. Sawyer joins in consenting to the appointment of Mr. King as Sole Commissioner for the purposes of partition and division of the estate of the deceased. Notice was given by the commissioner to the attorneys, Bates and Sawyer, and he was attended by all the parties interested in the said estate. Record, p. 25, Ex. G. The confirmation was made. Ex. H., 31.

This confirmation stands as the transfer of the rights of the children by the consent made by Mr. Sawyer to the appointment of Commissioner King as the Sole Commissioner, to make the partition.

In the report of the commissioner, the particular lot which the administratrix had expressed a desire to have in the partition was allotted to her in severalty, and which she sold to James C. Flood on the 24th of May, 1875.

The minor children did not participate in this partition, and did not become a party to it.

The proposition to proceed to make the partition was presented to the Probate Judge, and accepted and approved by the Probate Judge on the 29th March, 1875, *immediately* after the administratrix had performed her last act of practical administration in that office. The hurry was so great that the managers seemed unready or unable to put before the Probate Court any of the pleadings,

statements to have inventories or appraisements, and those balances which are referred to in the petition of the administratrix. The prepared order, to appoint Mr. King the sole commissioner, the ready acquiescence of the Probate Judge, the quiet attendance of the attorneys were the conclusion of the proceedings of that day. In this country it has been generally understood that an administrator is not a proper party to proceedings of partition.

The administrator is not commonly an owner of the lands as an heir, and it is inconvenient to have a person directly interested in the partition to have other connection to interest him.

Mason *vs.* Willard, 2 Mass., 478.
Richards *vs.* Richards, 136 Mass., 126.
Newton *vs.* Brouson, 13 N. Y., 593.
14 So. Ca., 178.
Whitlock *vs.* Willard, 18 Flor., 156.
Tindall *vs.* Drake, 51 Ala., 574.

The administratrix in this instance vacated her place as mistress of the suit, and in the partition is simply an heiress, for an undivided one-third part of the property. The minor children seemed to have had no attendant.

If the deceased Horace Hawes could have been consulted, he would as a sound lawyer, as well as a provident *pater familias*, have counselled to postpone indefinitely this abnormal proceeding.

The administrator, we are told, followed the committee which the Bishop or ordinary had appointed to administer the personal estate of deceased persons; then came the Statutes of Westminster and of Henry VIII.

The partition of the freehold did not form any portion of the jurisdiction. The procedure in this case seems to have been crude and clumsy. We look in vain for the protection, defence, surveillance, which we search for in all cases of the kind.

The Constitution of California authorizes the formation of a Probate Court.

In every county a county Judge is chosen to preside in the County Court. This Judge has a separate chamber, in which he may "*perform such duties as Probate Judge as may be prescribed by law.*" The Supreme Court, the District Court, the County Court, and Courts of a municipal jurisdiction are provided. San Francisco, county, and city, is entitled to a separate Judge of Probate under the constitution.

The constitution confided to the District Court original jurisdiction in all cases in equity; in all cases at law which involve the title or the possession of real estate; and in all other cases in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars. We should say that the District Courts of California have original jurisdiction in actions of partition. The use of the words *all cases* might fairly be regarded as assigning to the District Courts plenary jurisdiction in such actions. The chancery has maintained her claim, the common law has an immemorial title.

There was introduced about 1874 the words partition and distribution into the articles of probate jurisdiction so as to give a standing before the tribunals. I do not see in the reported cases that the standing is firm. The only vindication for it is that a Probate Court is local and the sessions more frequent. The question is still for consideration, whether the constitution of the State justified the codifiers in the invasion of the jurisdiction of the District Court, and in expanding the jurisdiction of the Probate Court. The jurisdiction exercised by the Roman Praetor of authenticating the will of the Roman citizen after his death, and its preservation and the decision of questions as to its genuineness and validity, still belongs to the California Probate Court. We find a prompt method of subjecting real property to the payment of debts, and that legacies

and other claims on the property of a decedent are within the jurisdiction of the Court. This Court had jurisdiction over the accounts of guardians with their wards, whether sane or insane. Much of jurisdiction and of authority has been conferred in the codes, and the later statutes and decisions have conferred power and removed restraints.

The procedure which was employed in this suit has been very extensive in the application of the words of the codes.

The question of jurisdiction of the Probate Court to make the decree of partition of this property, is simplified by the judgment of this Court in the case of the Bank of Hamilton *vs.* Dudley, 2 Peters, 496.

The Court of Common Pleas of each county in the State of Ohio in 1803 was empowered to grant administration over intestate estates, and to take proof of wills, and to hear and determine all causes, suits and controversies of a probate and testamentary nature. At the May term, 1804, the administrator of Israel Ludlow exhibited an account of the estate, and obtained an order to sell so much of the real estate needful to pay the demand, not to include his residence. There was a territorial statute adopted from Pennsylvania in 1795, which authorized the Orphans' Court to direct a sale of lands of a decedent to pay his debts. This statute was repealed before the allowance of the order to sell the lands of Israel Ludlow. The Common Pleas of Ohio succeeded to the probate jurisdiction of the Orphans' Court. The sale took place under the order made in the Common Pleas. There was an attempt to have the order of sale to relate to a date prior to the repeal of the statute, which did not succeed. So the validity of that sale depended upon the jurisdiction of the Common Pleas, without the Act which had been repealed.

The jurisdiction of that Court had jurisdiction of all causes, suits, and controversies of a probate and testamentary character.

There was a cause arising in an estate the Court had jurisdiction of the suit, cause, or controversy, and execution had been awarded, and an act of the legislature repealing the authority to sell the lands destroyed the sale.

The chief justice, in delivering the judgment of the Court, made use of expressions of great cogency, "Jurisdiction of all probate and testamentary matters may be completely exercised without possessing the power to order the sale of the lands of an intestate. Such jurisdiction does not appear to us to be identical with that power or to comprehend it. The constitution did not mean, and could not mean to deprive the legislature of the power of exercising its wisdom on the subject so vitally interesting to the people, nor do its words convey such a meaning."

The power conferred upon the General Assembly of California is confined to a Court having jurisdiction *of all probate and testamentary matters.* Other Courts have plenary powers to do the thing that is the subject of complaint in this cause.

In the same opinion there occurs another passage as follows: The counsel have contended "that the interest of the administrators in the real estate as trustees for the creditors, was a vested interest which the repeal of the law cannot divest, and they might proceed to sell under sanction of an order even after the law was repealed."

On this point we cannot doubt. The lands of an intestate descend not to the administrators, but to the heir. They vest in him liable it is true to the debts of his ancestor, subject to be sold for these debts. The administrator has no estate in the land, but only a power to sell under the authority of the Common Pleas. This is not an independent power to be exercised at discretion when the exigency shall require it; but is conferred in a state of things prescribed by law. The order of the Court is a prerequisite, indispensable to the very existence of the power, and if the law

which authorized the Court to make the order be repealed, the power to sell cannot come into existence.

The Bank, &c. *vs.* Dudley, 2 Pet., 494.

The property of Horace Hawes, deceased, on the 18th February, 1875, consisted, for the most part, in real property, not encumbered with debt. His widow had been administratrix, and as such she had possessed the property exclusive of the rights of the heirs at law by descent. She was an heir in common with the two minor children. As administratrix, she owed a duty to have a final account with the Probate Court of the administration, and to transfer by a decree of distribution to the ownership of the heirs at law relieved from the administration. The Probate Court in California, previously to this case, had not participated in matters of partition of real property, as a judicial function of the Probate Court.

The petition of the administratrix was filed to make her own settlement of her own account of the personal estate and of her receipts and expenditures; then to return the property to the heirs at law, and receive from the Court her final discharge. The prosecution of a suit by the administratrix to accomplish those results, does not come under any cognizance of this Court in this cause.

The suit is for land which descended to the two minor children from their ancestor, Horace Hawes. This title, until the 29th March, was incontestable. There was no encumbrance upon it.

After a somewhat busy day in the Probate Court, two attorneys proposed to the Judge of the Court to record their consent in open Court, that to a person named James L. King the entire business of making a judicial partition of the lands of Horace Hawes deceased, among the heirs. The heirs are the widow and two minor children, one sixteen, and the other ten years of age. The

children had not been declared heirs at law, and had not been relieved from the possession of the independent functionary who, for some years, had officiated as administratrix. On the record, this administratrix had conducted the proceedings till this motion to transfer the subject to the commissioner King. Commissioner King allotted the lands sued for to the administratrix, and she sold them to Mr. Flood some weeks after.

The question before us is to determine whether this Probate Court divested these children of their *birthright*, conformably to the constitution and laws of California?

The statement of this Court in the case we have cited from the Ohio Circuit is corroborated by the judgments delivered in Pervis *vs.* Hegley, 20 Wall., 375; *Ex Parte* Lothrop, 118; U. S., 113–119; 10 So. Ca. R., 317; *In re* Algier, 65 Call., 228.

The introduction of the terms partition and distribution into the code of California seems to have been effected only during the year preceding the resort to this mode of closing an administration. The separation of real and personal property in the administration of estates has been maintained with consistency among the older States, and the introduction of partition as a branch of administrative duty does not seem to have attained any great adoption. The cases do not seem to be administration cases, but the Probate Court acts rather as a convenient agency to effect a partition in ordinary cases or within certain limits prescribed.

The Constitution of California separates the judicial power to be deposited with the Probate Court from all other forms of that power. The court acquires it by the occurrence of death, the placing of seals upon the effects, the inquiries for wills or other testamentary papers. There are inventories, appointment of tutors, or curators, or guardians; sales of succession property. The realty passes by descent or by testament beyond the control of the Pro-

bate Court to the heirs. The heirs are recognized as owners, and not to be deprived without notice and great necessity.

Partition may be made, but all of the heirs must be represented, and if minors, by a guardian.

It is a rule that the infants be made parties according to the rule.

Bonnell *vs.* Holt, 89 Ill.

Carver *vs.* Carver, 64 Ind.; 45 Wis., 61.

The practice of the Probate Court in this pioneering suit does not comport with the fundamental principles which everywhere attend upon and regulate the methods of the parties to the action. It is a general rule that all persons who hold real property in common may remove the indivision through a judicial proceeding.

In order to accomplish this, all who have a community of right must be parties to the suit. Many writers insist the action is indivisible, and the partition must be complete. The California Code has a settled rule that infants *must* be represented by a guardian. In a proceeding of the kind, the author of the suit must consider who are necessary parties to the suit, and in what manner shall the parties be made; the service on a general guardian, or the taking the measures to have a guardian *ad litem* appointed in case of his absence; duty of the author or prosecutor of the suit. The Court will decline jurisdiction of the cause.

Barney *vs.* Baltimore, 6 Wall., 280.

Story *vs.* Livingston, 13 Peters, 359.

In an action of partition, all parties in interest must be joined or represented, and plaintiff must show that the proper parties are before the Court.

16 La. Rep., 157.

4 Ann., 56, 260.

Mr. Freeman supports the conclusion, that unless the infant voluntarily appears in some manner authorized by law, or is served with process in substantial conformity with the provisions of the statute, the partition is not binding on him.

41 Mo., 413; 54 Ill., 316; 15 La. Ann., 250.

The appointment of a guardian *ad litem*, and his appearance for an infant defendant, no process having been served on the latter, do not give jurisdiction.

Chambers *vs.* Jones, 72 Ill., 275.

The record is without evidence that a guardian or guardian *ad litem* has been appointed for these minors at any time during the progress of this administration, or during this suit. The appointment of a general guardian or a guardian *ad litem* might have been provoked by an application to the Probate Court.

The only measure adopted was that an attorney was appointed to represent the minors, after the cause had been called in the Court for a hearing, and it was not suspended that he might be made acquainted. The laws and rules made for the defence of minors are laws affecting the public order. The minors are incapable of self defence. Their disabilities result from the law. It does not confide to them the custody of property or the control of their own actions. It places them under the guard of others. When the Courts or adults shall disregard or surmount the barriers made for their protection, the law vindicates its own strength by affording ample redress.

The Court of Probate, having a statement in the petition of the administratrix that these children were minors, and one an infant, had no jurisdiction to determine a cause in which their rights of property were so directly involved.

The administratrix might confide to Mr. King the whole busi-

ness of partition, in so far as her rights were involved, but she had no control over those of her young daughter. She had a clear right to be represented by an independent, disinterested, and impartial guardian.

I.

The proceeding in the Probate Court of the county and city of San Francisco for the final settlement of Horace Hawes, deceased, is arraigned, in so far as the partition of the lands made by J. S. King, Sole Commissioner, has been adopted and confirmed in that Court, as not valid, and not within the competency of the Court.

We submit to the Court that the Probate Court which the people of California authorized to be made, and the duties as probate judges, which might be prescribed to the officer who should fill the appointment, did not justify the action in this case.

The probate of wills, their custody, the grant of letters testamentary or of administration, the appointment of guardians of infants, and what pertains to the collection of the estate and the distribution of the personal estate in the payment of debts and legacies.

In California the division of property into real and personal, and the division of estates into estates in possession and reversion or remainder, were recognized with the common law. In the cases of partition of estates among heirs at law, whether by testament or inheritance, the partition of lands involves the proprietary interest of persons who are *sui juris*, with determinate rights, and where the transmission from the dead to the living is complete.

The cases which have been cited show that a Court endowed with plenary jurisdiction of probate and testamentary jurisdiction, did not necessarily include or comprehend a power to authorize an administration to sell lands for the payment of debts.

Bank *vs.* Dudley, 2 Peters, 494.

Pervis *vs.* Hegley, 20 Wall., 375.
Ellis *vs.* Davis, 109 U. S.
Almy *vs.* Carpo, 100 Mass., 220.
Lemoine *vs.* Guinby, 70 Ill., 403.
Haverstack *vs.* Trudell, 51 Cal., 431.
Overton *vs.* Overton, 10 La., 470.
United States *vs.* Walker, 109 U. S.

The Constitution of California provides a District Court with original jurisdiction of *all cases in equity*, of *all cases at law* which involve the title or possession *of real property*, and over all demands of which the exact value was above $300. The fullness of the jurisdiction confirmed on this Court.

II.

The administratrix was not a competent party to prosecute a suit for the partition of the real property, which had descended to the heirs at law and was in the possession of the heirs at the time when the consent order of the two attorneys and of the Court was adopted. Neither did the order made, appointing the commissioner, have validity.

The minor heirs had not been served with any process, directly, nor by service upon a general guardian or a guardian *ad litem*.

The Probate Court had no authority to appoint an attorney of the Court to represent these parties in this cause, nor to bind them by any agreement he should make.

III.

The Court of Probate did not acquire jurisdiction over the persons of these plaintiffs. In respect to the service upon the minors, the decision in Galpin *vs.* Page, 18 Wall., 350, arose in

California, and refers to the practice there. We have cited statutes to the same effect in that state. The statute is the effect that a guardian must be present to appear for the minor. The sensibility of the country to the perfunctory administration in Courts, is such that the Constitution of the United States has been amended and improved to accomplish a reform. It would hardly be deemed due process of law, what has appeared in this case in respect to these minors.

The object of partition is to separate the property held in common in such a manner that each tenant shall be treated with fairness, and that this shall be fully realized by all concerned.

The law makes provision for a notice to be given to the parties in interest, that there shall be inventories, &c. Where the parties are not present, or if there be minors or *femes covert*, and these persons for the most part are incompetent to act, a judicial partition is requisite. Adults can arrange a partition for themselves. The minors are not in the enjoyment of those rights.

The mode of procedure is determined in the Code, for this mode is prescribed to the Court to afford security to the interest of such parties. They are laws of public order because of the fact that these persons cannot adequately provide for themselves. The Court has no authority to make a substitution of a tribunal the law has not recognized. There can be no bargaining or huckstering in the matter. The Codes do not allow the minor, nor the guardian of the minor, nor the Judge, to make a transaction among them, and pass it into a decree. The regular and systematic neglect of the duties imposed upon the Court, show the importance of the safeguards which have been established, and which have been rendered abortive.

In all matter, the spirit that vivifies must be preferred to the inert and unenlightened letter. Sometimes there have been accommodations and interpretations more or less benign or harsh and

arbitrary, so as to avoid a result not equitable. The law, steadfast and resolute, which does make conditions with time or persons, ought to be the guide and to carry us in the pathway she has opened for us. The plaintiffs were without support, save in the safeguard she has established.

JOHN A. CAMPBELL,
For the Plaintiffs.

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Supreme Court of the U. S.

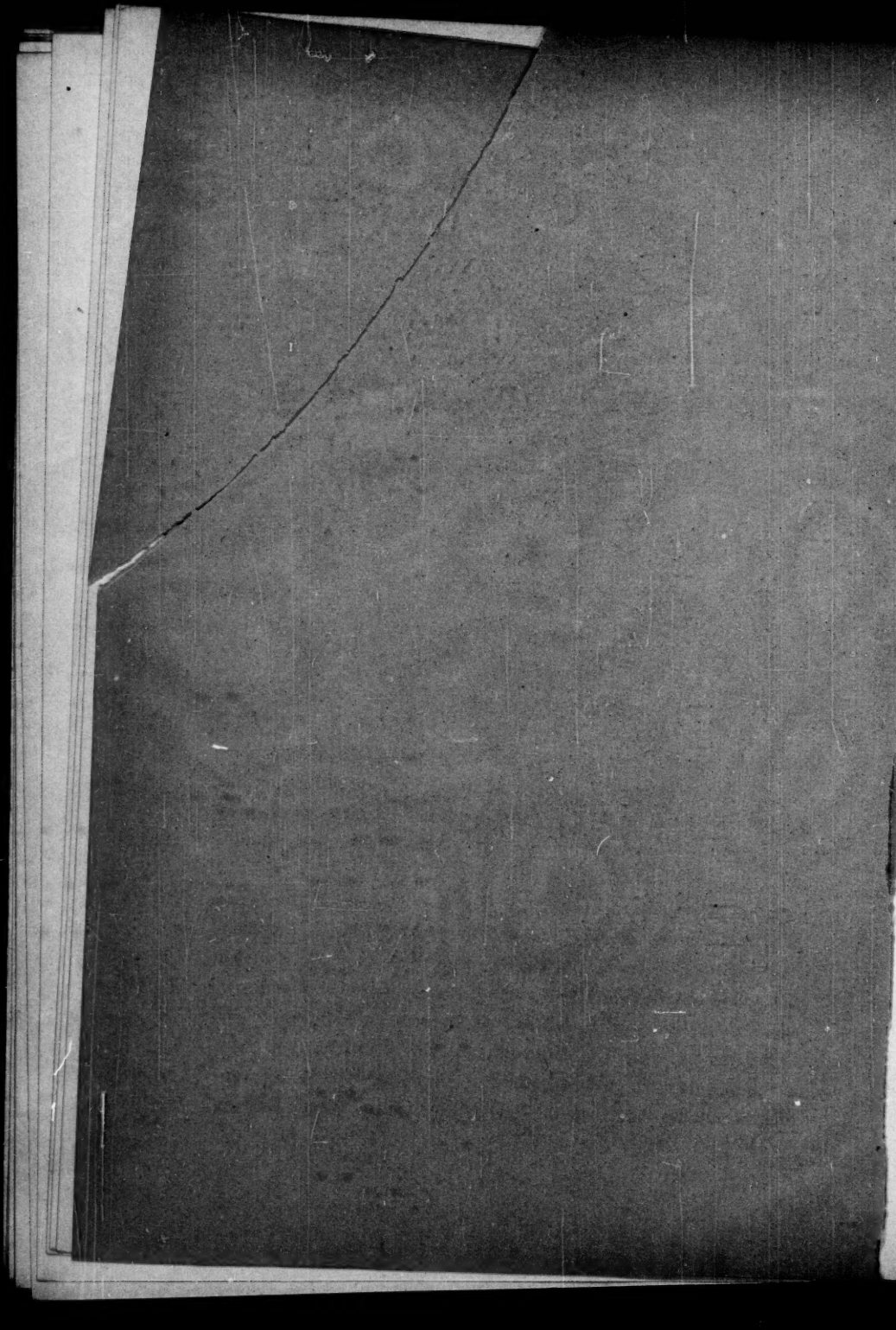
JAMES A. ROBINSON, ET AL.,

vs.

JAMES G. FAIR.

J. C. BATES,
JOHN A. CAMPBELL,
Attorneys for Plaintiffs in Error.

JOHN MURPHY & CO., PRINTERS, BALTIMORE.



Supreme Court of the U. S.

JAMES A. ROBINSON, ET AL.,

vs.

JAMES G. FAIR.

STATEMENT OF FACTS.

Horace Hawes, the former owner of the real estate in question, died intestate in San Francisco, March 12th, 1871, leaving his widow and two children, Horace Hawes and Caroline C. Hawes, (the latter since intermarried with the plaintiff, James A. Robinson), his heirs at law.

Administration was duly had in San Francisco upon the estate of Horace Hawes, deceased, and on March 29th, 1875, the Probate Court of the City and County of San Francisco made and rendered a decree of distribution, distributing to said widow and said two children, the estate of Horace Hawes, deceased, including the land in controversy, share and share alike, to wit: one-third ($\frac{1}{3}$) to each.

Subsequently the widow, Caroline Hawes, Administratrix, applied to said Probate Court for a partition of said estate between

herself and the two children, who were then minors, of the ages of 16 and 11 years respectively.

Subsequently, after published notice, one Charles H. Sawyer was appointed to represent the said children. The said Sawyer consented to a decree of partition and to the appointment of a commissioner to make partition.

An order was made, based upon the report of said commissioner, partitioning said estate, and awarding the land in controversy to Caroline Hawes, and property elsewhere to the two children respectively.

The defendant claims title to the land in controversy, through mesne conveyances from Caroline Hawes.

The plaintiffs seek to recover an undivided two-thirds of the property in controversy.

They claim that the proceedings in partition were without jurisdiction and absolutely void.

I.

Constitutional and Code Provisions.

The Constitution of 1863 was in force during the period covering the probate partition proceedings impeached in this case.

That Constitution provided for several Courts, and declared and conferred their several jurisdictions.

Article VI, Section 1, reads:

"The judicial power of this State shall be vested in a Supreme Court, in District Courts, in County Courts, in Probate Courts, and in Justices of the Peace, and in all such Recorders and other inferior Courts as the Legislature may establish in any incorporated city or town."

Article VI, Sections 2, 3 and 4, prescribes the appellate jurisdiction and the power of the Supreme Courts.

Article VI, Section 6, reads: (District Court).

"The District Court shall have original jurisdiction in all cases in equity; also, in all cases at law which involve the title or possession of real property, or the legality of any tax, import, assessment, toll or municipal fine, and in all other cases in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars; and also in all criminal cases not otherwise provided for." . . .

Article VI, Section 7, reads: (County Court).

"There shall be in each of the organized counties of the State a County Court." . . .

Article VI, Section 8: (County Court).

"The County Court shall have original jurisdiction of actions of forcible entry and detainer, of proceedings in insolvency, of actions to prevent or abate a nuisance, and of all special cases and proceedings as are not otherwise provided for; and also such criminal jurisdiction as the Legislature may prescribe. They shall also have appellate jurisdiction 'from Justices and inferior Courts.' *The County Judges shall also hold in their several counties, Probate Courts and perform such duties as Probate Judges as may be prescribed by law.*" . . .

Under the Code as in force in 1874 and 1875, and under which the proceedings in this case were had, it was provided that in the case of decedents' estates, partition might be had of real and personal estate (Olney's Code of Civil Procedure (4th Ed.), S. 1675); upon the petition of any person interested (Ib. Sec. 1676).

Where heirs or devisees have conveyed their interest, their shares may be assigned and set off to the assignees or grantees (Ib. Sec. 1678).

If partition is impossible, the whole may be set off to one, he paying the rest the value of their shares (Ib. Secs. 1680–1681), or sold (Ib. Sec. 1682).

II.

It is evident that a Probate Court is erected by Sec. 8, Art. VI, for each county, to consist of the County Judge sitting as a Judge of Probate.

The Common Law and Equity jurisdiction is divided between the County Court sitting as a Court of Law of general jurisdiction, and the District Court sitting as a Court of General Law and Equity jurisdiction.

The former is given jurisdiction of actions of forcible entry and detainer, to prevent or abate nuisances of special proceedings and cases, and such criminal jurisdiction as the legislature shall prescribe.

The latter is given jurisdiction in all cases in equity, in all cases at law involving the title or possession of real property or the legality of any tax, etc., and in all other cases in which the demand, exclusive of interest, or the value of the property in controversy, amounts to $300.

The functions of the County Judge, sitting as a Judge of the County Court and as a Probate Judge, are different.

The County Court as a Court of general jurisdiction, and that Court, as a Court of Probate, are two different Courts, although the same persons be respectively the judge, clerk and bailiff of each.

Hinds Exr's *vs.* Imboden, 5 Ark., 385.

This is recognized in the whole series of California cases, and is in fact indisputable.

Will of Bowen, 34 Cal., 689.
Smith *vs.* Andrews, 6 Cal., 652.
Clarke *vs.* Perry, 5 Ib., 58.
Swift *vs.* Swift, 40 Cal., 456.

Treat *vs.* De Celis, 41 Cal., 202.
Estate of Burton, 64 Cal., 428.
Haverstick *vs.* Trudel, 51 Cal., 431.
Estate of Hudson, 63 Cal., 454.

III.

The Statute, authorizing the partition proceedings had in this case by the Probate Court, can only be valid on the assumption that the constitution has either expressly vested jurisdiction over partition proceedings in the Probate Court, or has authorized the legislature to do so.

The legislature cannot enlarge the jurisdiction of a Constitutional Court.

Cameron *vs.* Kenfield, 57 Cal., 550.

Or vest in another Court that jurisdiction which the constitution has placed in one designated therein.

Zander *vs.* Coe, 5 Cal., 231.
Appeal of S. O. Houghton, 42 Cal., 35.
Will of Bowen, 34 Cal., 689.
Willis *vs.* Farley, 24 Cal., 491.
Wilson *vs.* Roach, 4 Cal., 362.
Rosenberg *vs.* Frank, 58 Cal., 402.
See Cooley Const. Lim. (3rd Ed. 90) note 2.

The Constitution has vested jurisdiction over partition proceedings in the District Court as a Court of Equity by virtue of the grant of jurisdiction "in all cases in equity" (Cal. Const. Art. VI, Sec. 6); where the remedy is sought in equity; and as a Court of Law, under the jurisdiction given of all cases at law which involve the title or possession of real property (Cal. Const. 1863, Art. VI,

Sec. 6); where the remedy is sought in partition proceedings at law.

This jurisdiction is thus vested because partition proceedings under the settled principles of our jurisprudence, in the light of which the Constitution speaks, are proceedings in equity or at law, and are cases in equity or at law accordingly as the one forum or the other is sought.

Jurisdiction at Law.

Actions at law for partition existed at *the common law* in the case of Parceners prior to the reign of Henry VIII, and in that reign the right to a writ of partition was given to tenants in common.

1 Washburn, R. Prop., 676.
1 Spence, Eq. Jurisd., 162.
Freeman, Co-tenancy and Partition, Sec. 420.

In the case of Parceners, the legal action was familiar in the time of Littleton.

Coke on Littleton, Sec. 2417.

A partition proceeding was then in the case of Parceners "a case at law," within the meaning of our constitution. The extension of the remedy by statute, to tenants in common and joint tenants, did not create a new jurisdiction. Writs of partition allowed to such tenants, were not special cases, that were not cases at law. The statute extended a remedial right cognizable at law and enforceable in an action of partition to persons other than those who had previously enjoyed such rights. The operation of the statute was strictly analogous to the operation of a statute at the present day, extending the remedy by injunction.

Were a statute to give such remedy, where on the settled principles of equity it would not previously be allowed as for a mere trespass against which, injunction could not be had (1 Washb. R. P., 160), no one would contend that thereby the jurisdiction of a court of equity had been enlarged *in a constitutional sense* beyond the constitutional bounds.

The action of partition at law as it immemorially existed at common law remained such, although the remedy was extended to joint tenants and tenants in common, and, as such, came down to us as a part of the *jurisdiction at law* devolved upon certain Courts by American Constitutions under the designation of "cases at law."

Its origin is as ancient as the action of trespass on the case. Whether like the latter (Pomeroy's Municipal Law, Secs. 200, 201) it sprang out of or was based upon statute, or not, it comes within the constitutional description of a "case at law" or of a "jurisdiction at law."

Jurisdiction in Equity.

Courts of Equity assumed a jurisdiction over partition proceedings based not upon statute, but upon the inadequacy of the legal remedy.

1 Spence, Eq. Jurisd., 642–653–654.

Freeman, Co-tenancy and Partition, Sec. 423.

It seems to have first exercised the jurisdiction to compel partition where one co-tenant was a minor.

1 Fonblanque's Eq., 18, note.

And the earliest assignable time of its assumption, the reign of Elizabeth.

1 Fonblanque's Eq., 18, note.

The jurisdiction had its origin in and was based upon the same considerations as the jurisdiction of Chancery as to Specific Performance, accounting, dower, tithes, etc.

1 Spence, Eq. Jurisd., 642 to 655.

It is and for centuries has been a branch of Chancery jurisdiction, as completely as the jurisdiction over trusts, or over injunction proceedings, and a proceeding for partition is and always has been a case in equity, as completely as cases of the latter sort, within the meaning of constitutional grants of jurisdiction.

The reports are full of cases involving the exercise by Chancery Courts of common law jurisdiction over such proceedings.

Conclusion.

Partition jurisdiction, being a two-fold jurisdiction, one at law, the other in equity, conferred by the Constitution upon the District Court; under the cases cited at the head of this division (III), such jurisdiction was exclusive in that Court. It could not be vested by the legislature, either as a concurrent or an exclusive jurisdiction in another Court, unless authority to that effect was given expressly or by necessary implication by the constitution.

IV.

The grant of Probate jurisdiction is in these words:

"The County Judges shall also *hold in their several counties Probate Court*, and perform such duties as Probate Judges as may be prescribed by law."

Cal. Const. 1863, Art. VI., Sec. 8.

If partition jurisdiction is or may be vested in the Probate Court, it must be either because the last clause, "as may be prescribed by

law," empowers the Legislature to impress a jurisdiction properly at law or in equity with a probate character, and thereupon vest it in the Probate Court, or, in other words, to vest in the Probate Court other than strictly probate jurisdiction; or because probate jurisdiction, either as received from the English law or as remodelled in America, includes a limited partition jurisdiction as a part and incident thereof. Neither position is tenable.

The clause in question is not a drag-net under the authority of which the Legislature may vest in the Probate Court other than strictly probate jurisdiction.

The clause is rather restrictive. The nature of the Court marks the extreme bounds of the jurisdiction it may or can exercise—to wit, probate. The clause in question confines the probate *powers* it may at any time exercise within those bounds to those powers expressly authorized by the Legislature. The constitutional grant of jurisdiction to the District Court as a court of law and equity is a direct grant, requiring no legislation to enable its exercise. When once the Court is organized it may exercise that jurisdiction, and needs no legislative authority—and no statute can restrict that jurisdiction.

The constitutional grant to the Probate Court is of a *capacity* to exercise probate powers. No such powers can be exercised, although the Court be organized, until and except so far as expressly authorized by statute.

The District Court looks solely to the Constitution for its *authority;* the Probate Court to the Constitution *and to the statute.*

This operation of the clause in question is recognized in Bush *vs.* Lindsey, 44 Cal. 121. (See pp. 124, 125.)

There it was claimed that the Probate and not the District Court had jurisdiction of the settlement of the account of a deceased administrator, and that therefore the administrator *de bonis non* of the decedent could not sue the administrator of the deceased

administrator in the District Court for the assets of the decedent's estate.

The Court expressed the opinion that "the statute might perhaps with propriety" have authorized the Probate Court to determine such controversies, but decided that it had not so provided, and that the aid of the statute was requisite to call the constitutional jurisdiction into exercise.

In Rosenberg *vs.* Frank, 58 Cal., 402, the Court said:

"It seems from the above (Art. VI., Sec. 8 Cal. Const.) that legislature may make the jurisdiction of the probate Judge or Court, what it pleases, *within the limits of that jurisdiction which is understood as usually pertaining to Probate Courts.* But the position, that it can under this power, take away from the District Courts any of the equity jurisdiction conferred on them by the constitution, is manifestly untenable."

Similar clauses have been construed as not empowering the legislature to extend the powers of a Probate Court beyond the proper and established bounds of the established probate jurisdiction, as known to American and English jurisprudence.

Ferris *vs.* Higley, 20 Wallace, 373.
Cast *vs.* Cast, 1 Utah, 112.
Lockrane *vs.* Martin, McKahon (Kan.), 60.
Moore *vs.* Kenbly, 1 Idaho, 62.

The construction is rational. Otherwise there exists no limit to the jurisdictions the legislature may vest in the probate court. It may vest in that court, law and equity jurisdiction, concurrent with the district, County and Justices' Court, making it a "hotch-pot" of the entire judicial power.

Such a contrary construction would belie the manifest purpose of the makers of the instrument to distribute jurisdictions beyond the power of the legislature to remove.

That the legislature might be disposed to do so, is evidenced by the legislation in other States.

In Idaho, the legislature attempted to vest criminal jurisdiction, and appellate jurisdiction from the Justices' Court, in that Court. See

People *vs.* Du Reil, 1 Idaho, 44.
Moore *vs.* Koubly, 1 Idaho, 61.

In Missouri, jurisdiction over common law actions against the executor or administrator, for claims against the estate, is vested exclusively in the Probate Court. See

Wernecke *vs.* Kenyon, 66 Mo., 275.

In Michigan a very large part of the Chancery jurisdiction is vested in that Court. See

People *vs.* Wayne Circ. Ct., 11 Mich. 393.

V.

The conclusion is irresistible from the foregoing considerations that Section 8 of Art. VI., authorizes the Legislature to confer on the Probate Court, probate powers and jurisdiction *and those only.*

Unless the power to partition among heirs is a probate power, and the jurisdiction over partition proceedings, is a part of the probate jurisdiction recognized in the Anglo American jurisprudence, the provisions of the statute and code for partition by the Probate Court were void and the partition proceedings under which the defendant in this action claims, were *coram non judice* and absolutely void.

Such a partition jurisdiction might be a part of the recognized probate jurisdiction and involve no judicial inconsistency. There would be no more judicial difficulty in the co-existence of such

jurisdiction in probate and in chancery, than in the co-existence of the same in chancery and at law.

Upon a superficial view, a limited power of partition (confined to the interest of heirs) in the Probate Court, seems appropriate and strictly analogous to and a legitimate extension of the process of distribution. But the seeming appropriateness is not, and cannot be the constitutional measure of that jurisdiction; *and there is a radical and a striking difference between the theory, nature and operation of partition and distribution*, a difference which distributes the two proceedings to two diverse branches of judicature.

VI.

We shall show:

1*st.* That partition is not a part of the probate jurisdiction derived from England (Subd. A, Div. VII).

2*nd.* *That on principle, partition does not belong to a probate jurisdiction and is not analogous to, or a legitimate extension of probate distribution, herein, showing the essential nature of proceedings probate, and proceedings at law and in equity including partition, and the test by which to discriminate the two* (Subd. B, Div. VII).

3*rd.* That it is not an appropriate power for probate exercise (Subd. C, Div. VII).

4*th.* Explain away certain difficulties resulting from the extension of probate powers, beyond those exercised by the ecclesiastical Courts of England (Subd. D, Div. VII).

We shall show under subsequent heads:

That, partition powers, wherever exercised, by Probate Courts in the United States, have been exercised by express authority of Statute;

That, such Statutes, where enacted, have been in States possessing no constitutional distribution of jurisdictions or no constitu-

tional restrictions upon the legislative additions to the legitimate powers of Probate Courts.

That, partition has never been regarded as a legitimate part of the probate jurisdiction.

That, partition has never been decided to be a part of such jurisdiction when granted by a constitutional provision.

That, the probate jurisdiction borrowed from the English ecclesiastical Courts, has not been remodelled in America so as to include partition, and

That, the practice of vesting a limited and varying power of partition in American Probate Courts, is not so general or uniform as to warrant the doctrine that the California Constitution, in granting probate jurisdiction, granted that jurisdiction as enlarged by the incorporation of a power of partition.

VII.

Sub-Division A.

Partition is not a part of the probate jurisdiction derived from England and exercised in America by Probate or Surrogate Courts.

The Probate and Surrogate-Courts in America, are the lineal successors of the ecclesiastical courts of Great Britain.

Payne's Will, 4 Monroe (Ky.), 423.

Our State Constitutions recognize three civil jurisdictions, derived from the jurisprudence of England; law, equity and probate, and distribute them to the several tribunals.

To the limits of these several jurisdictions, as exercised by the several *judicatories* of England, our courts look for the boundaries of the judications deposited by our organic laws in the several state courts.

The jurisdiction of the ecclesiastical courts was exercised, with certain exceptions immaterial for the purpose of this head, over the personal estate only.

Toller's Law of Executors, 67, 80.

In the case of wills, its power was confined to admitting the will to probate. It had no power to decree or enforce distribution.

Toller's Law of Executors, 490–491.

In re James Eakin, 5 C. E. Green (N. Y.), 481.

The executor was liable in equity only, and then only as a trustee.

Ib.

Originally, the ecclesiastical court had no power to decree distribution, even in the case of intestacy.

Toller's Law of Executors, 369.

Its attempted exercise of that power was prohibited.

Ib.

That power, in the case of intestacy, was expressly given by statute.

22 and 23 Car., 2 Ch. 10.

The mere distribution or declaration of the rights of the next of kin to the undisposed of residue in the case of intestacy, and the enforcement of the surrender by the administrator, an officer of the court, to the kin of that residue, was the extent of the power exercised by the ecclesiastical court.

The partition of that residue was left to the voluntary action of the kin, or to their coerced action in obedience to the decree of a court of law or equity.

The power of partition did not inhere in the court at common law any more than the power of distribution; it was never conferred upon the court by English statute, and no attempt was ever made by the ecclesiastical court to exercise the power.

The only case, so far as we have been able to discover, in which the question whether the power of partition is a part of the probate jurisdiction, has been actually and necessarily decided, is an American case.

Davenport *vs.* Caldwell, 10 S. Car., 317.

The South Carolina Constitution of 1819 contained no distribution of jurisdictions (see *Infra*, p. 49, 50).

In 1824 a partition jurisdiction was vested in the Probate Court, and was thereafter habitually exercised up to the adoption of the Constitution of 1868 (see *Infra*, p. 49, 50).

The Constitution of 1868 provided for certain courts and distributed to them the various jurisdictions at law and in equity. It provided for Probate Courts, and provided that such courts should have jurisdiction "*in all matters testamentary and of administration*," business appertaining to minors and the allotment of dower, in cases of idiocy and lunacy and persons *non compos mentis*" (see *Infra*, p. 49, 50).

The revised statutes adopted subsequent to the adoption of this Constitution authorized the Probate Court to make partition among heirs and devisees.

The Court held the statute void, saying (p. 348): "The Act of the Legislature (Sec. 41 Rev. Stat. 573) does undertake to confer such jurisdiction, but the Court concurs in the views expressed by Moses, C. J., in his separate opinion in McNamee *vs.* Waterbury, 4 S. C., 167–8, that to determine the limits of the jurisdiction of the Court of Probate we must look to the Constitution, by which instrument jurisdiction is conferred."

By the Constitution of 1868 the "judicial power is vested in the several Courts named, and in such municipal and other inferior Courts as the General Assembly may deem necessary;" but the jurisdiction of each of those named, among them the Court of Probate, is defined and specified.

The jurisdiction thus defined and specified by the Constitution can be neither enlarged nor diminished by the Legislative power of the State, which is itself the creature of the Constitution, and controlled by the provisions of that instrument which constitutes the fundamental law.

Looking to the Constitution, then, for the limits of the jurisdiction of the Court of Probate, we find those limits defined in Sec. 20, Art. 4, and, as there defined, cases for partition of real estate are not embraced. The Court of Probate is unquestionably a court of inferior and limited jurisdiction. When the exercise of any power is claimed for a court of that character, it must be shown to exist by express grant, or to be necessarily consequent upon some power clearly given. *The power here exercised by the Court of Probate is not expressly granted in the Constitution, nor is it necessarily consequent upon any power which is given.* The conclusion follows that the power does not exist.

This decision is certainly a direct decision that partition is not within the legitimate Probate jurisdiction. The constitutional grant of jurisdiction over "all matters testamentary and of administration" is identical with a grant of "Probate jurisdiction."

Smith *vs.* Craig, 18 Miss. (10 S. & M.), 447.

It was declared under almost precisely the same constitutional and statutory provisions, that an act conferring partition power upon a probate court, would be unconstitutional.

Upon authority, it cannot well be questioned that the partition power does not come within the probate jurisdiction as derived from England.

SUB-DIVISION B.

Although there is a seeming appropriateness in the exercise of a limited power of partition by the Probate Court, and although on a superficial view, such a power appears to be analogous to, and a legitimate extension of the process of distribution, yet, neither position is true.

The inappropriateness of the exercise of such a power becomes more apparent when the incongruous and alien nature of that portion of the activity of a Probate Court has been demonstrated and illustrated.

Partition is not analogous to and is not a legitimate extension of the process of distribution.

This proposition is based upon the distinction between partition and probate proceedings in natures, object and operation.

This distinction is two-fold.

1*st*. Briefly stated, the object of administration is not to enforce a remedial right, or to transfer property. Its exclusive purpose and operation is to manage the estate as in receivership for the payment of debts and to announce authoritatively a legal succession.

No proceeding of the former description properly belongs to administration.

Partition involves an enforcement by the judicial decree of a remedial right and the motion of property rights *inter vivos*.

2*d*. Administration has exclusively to do with rights which spring from the succession, *i. e.*, out of the fact and process of inheritance.

When the Probate Court deals with other rights, it departs from its legitimate conventional and customary sphere, and overleaps the boundaries of its jurisdiction.

Partition deals exclusively with a remedial right springing out

of the nature of the property, estate, and utterly independent of the succession.

The first proposition appears more clearly from an examination of the essential nature of law and equity and of probate jurisdiction.

The essential characteristics of a generic proceeding at law or in equity, are as follows:

1*st.* It is an adversary proceeding.

2*d.* One party thereto asserts a remedial right to the transfer of a property *then* possessed and enjoyed by the other.

3*rd.* The judgment either *ex proprio vigore* or as executed, transfers that property from the possession or enjoyment of the one to that of the other.

In an action for condemnation of land, for public use, the moving party asserts a right to have the title and possession of land transferred to him.

The judgment establishes that right and *ex proprio vigore* (under the law in California) transfers the title to the complainant and as executed, the possession:

In ejectment, the moving party asserts a remedial right to the transfer of possession. The possession is a property good against all the world, including the State, except the real owner, and entitling the possessor to maintain ejectment against a disseizor, trespass against a trespasser, forcible or unlawful entry and detainer against an intruder or recalcitrant tenant.

The judgment as executed, transfers the possession.

In replevin a similar remedial right is asserted and possession is transferred.

In trespass to property or person, in debt, breach of covenant, etc., a remedial right is asserted to the transfer of the title and possession of a sum of money. The judgment as executed, accomplishes that transfer.

In specific performance, the remedial right is to the transfer of title and possession, the judgment as executed accomplishes the transfer.

The object of probate, is first, to marshall the assets of the decedent for the payment of his debts; *and second to ascertain and conclusively declare* upon whom and in what shares the law has cast the succession.

The legitimate powers of probate, comprehensively stated, are four in number:

1*st.* To find the fact of death.

2*nd.* To find the fact of testacy or intestacy.

3*rd.* To appoint an officer of the Court, denominated an administrator or executor to take charge of the decedent's estate under the control of the Court, and under its direction to pay the decedent's debts and otherwise apply the property.

4*th.* To find and to declare to whom the law of the case has already devolved the succession in what proportions and interests.

None of these proceedings are adversary proceedings in which are asserted remedial rights, and which do or may result in judgments that of their own force or as executed, transfer property rights.

All the acts of the Court fall under two heads:

(1) Directions given to its officer, the administrator or executor.

(2) Announcements of fact and of the legal rights arising thereon by reason of the law of succession.

First Class of Acts.

The executors and administrators are and ever have been officers of the Court.

Administrators, Toller's Law of Executors, pp. 82, 114.

Executors, Toller's Law of Executors, pp. 241, 369, 401.

They exercise a power over the estate under the direction of the Court.

That of the executor is (or at Common Law) was derived from the will.

Toller's Law of Executors, pp. 33, 46, 75, 95.

That of the admisistrator exclusively from the appointment by the Court.

Toller's Law of Executors, pp. 95, 100.

The executor and administrator have a special property only, temporary and qualified; a mere custody for the purpose of administration.

Toller's Law of Executors, pp. 133, 241.

Their powers were, at Common Law, briefly stated, to collect the decedent's goods, chattels and credits, to hold and manage the same, to sell or dispose of decedent's effects, to pay the claims on the estate, to pay debts.

Toller's Law of Executors, pp. 255, 256.

It was the duty of executor to pay legacies and of both, to surrender the residue of the property to the next of kin.

All acts done by the executor or administrator, are acts done in the exercise of a power.

All the orders and decrees made by the Court and running to the executor or administrator, are in the nature of directions to an officer of the Court, whether the same be to sell real or personal estate, to pay debts or legatees, or to distribute the residue to the kin or residuary legatees.

All the controversies before the Court by the parties interested had for their object to enlighten the Court as to the rights of the

various parties, and to aid it in managing through its officers, the estate in its custody.

No such controversies are adversary, controversies in which a remedial right is asserted and a judgment transferring of itself or as executed, property rights from one adversary party to another.

When the application is for the sale of property, there is no remedial right asserted, and no judgment accomplishing the transfer of property in the satisfaction of the right. The proceeding is a judicial proceeding to ascertain and declare the facts upon which depends the power of the Court to order, and of the executor to make, the sale of the property in its custody.

Where the application is for an allowance for the preservation of the estate or the maintenance of the family, is the proceeding an inquisition to ascertain the existence of the facts upon which depends the power which is given by the law to the agency administering the estate, to so apply a part of it.

The judgment of the Court is substituted for that of the executor as to those facts; and that judgment is made conclusive because rendered by a constitutional judicial tribunal.

Where remedial rights are to be asserted and judgment sought, transferring or requiring the transfer in satisfaction thereof, the parties must go to another forum.

Thus, the Ecclesiastical Court could not compel a debtor of the intestate to pay his debt into Court. The executor had to sue in a court of law (Toller's Law of Executors, 491); so if the legatee take a bond from the executor for the payment of a legacy, the legatee must sue at law.

Toller's Law of Executors, 491.

So at the present day, although the Court may examine into a claim against an estate in order to enable it or its officer to exercise the discretion possessed in the management of the estate, its adverse decision is not conclusive.

The remedial right to payment must be asserted and a judgment recovered in another forum.

The executor had to go to a court of law to recover in replevin property wrongfully withheld by another, to collect debts, to recover on bonds, to recover damages for breach of covenant or for injury to the personal estate.

Toller's Law of Executors, 157, 158, 159.

This character of the Probate jurisdiction runs through the entire Anglo-American jurisprudence.

The jurisdiction is a jurisdiction of management over an undisputed fund in the custody of the Court for the administration purposes—to wit, for the payment of debts and for the support of the family during administration. The moment activities diverging from this narrow thread of function are required, the domain of a diverse jurisdiction, not a jurisdiction of management but a remedial jurisdiction, must be entered.

The Probate Court can appoint an executor or administrator, and direct him, by successive orders extending to the close of the administration, to collect assets, to sell property, to pay debts, to apply so much of the funds in his hands as shall be necessary to defray funeral expenses and to support the family and to protect the fund, and finally direct him to deliver so much of the funds as shall be necessary in satisfaction of legacies and to surrender the residue to the heirs.

All activities outside this narrow channel, bounded in the beginning by the death and at the end by the distribution, and laterally by the limits of management, belong to law or equity. And the test of the new province and of the externality from the terminal or lateral boundaries of the Probate jurisdiction is the question whether those activities involve adversary litigation involving remedial rights and issuing in judgments enforcing such rights by the transfer of property.

Thus:

The Probate Court cannot compel a debtor to pay his debt to the executor. (Toller's Law of Ex., p. 491.) And, on the other hand, it cannot determine the validity or amount of a contested claim against the estate.

Disosway *vs.* Bank, 24 Barb., 63.
Andrews *vs.* Wallace, 29 Ib., 550.
Ex Parte Jones, 1 Redf. (N. Y.), 263.
Ex Parte Phyfe, Ib., 331.

Or determine the validity of an assignment when disputed.

Wood *vs.* Stone, 39 N. H., 573.

Or set off:

It cannot set off against a judgment against the estate, another judgment against the owner of the former.

Stillwell *vs.* Carpenter, 59 N. Y., 414.

So the Probate Court cannot entertain replevin. If a third party claim property in the hands of the administrator, the Court cannot require him to surrender it to the claimant.

Homers App., 35 Conn., 113.
Marston *vs.* Paulding, 10 Paige, 40.

Or ejectment:

It cannot try the question of a disputed homestead where it has a right to set aside a homestead.

Lazall *vs.* Lazall, 8 Allen, 575.
Woodward *vs.* Lincoln, 9 Ib., 242.
Estate of Burton, 61 Cal.

Or trespass:

It cannot compel an administrator who has wrongfully taken the rents of land devised for life, to pay the same to the devisee.

Calyer *vs.* Calyer, 4 Redf. (N. Y.), 305.

Equity:

Cannot determine the equitable ownership of a judgment against estate or its validity.

Stillwell *vs.* Carpenter, 2 Abb. N. C. (N. Y.), 238.

McNulty *vs.* Hurd, 72 N. Y., 518.

Or determine whether a legacy is a charge on real estate.

Bevan *vs.* Cooper, 72 N. Y., 317.

Or where the Court vacates a sale previously made by the executor, determine the rights and equities of the purchaser.

Eichellberger *vs.* Hawthorne, 33 Md., 596.

Or settle partnership accounts.

Nelson *vs.* Green, 22 Ark., 547.

Booth *vs.* Todd, 8 Tex., 137.

Or to foreclose a mortgage.

Myers *vs.* Farquharson, 46 Cal., 191.

Or to enforce a trust and to transfer the trust property to the *cestui que trust.*

Haverstick *vs.* Trudel, 51 Cal., 431.

Or entertain a suit to set aside a decree of distribution for fraud.

Estate of Hudson, 63 Cal., 454.

Or to enforce a vendor's lien.

Ross *vs.* Julian, 70 Mo., 209.

So far as the proceedings, prior to distribution, are concerned, the Court simply determines the fact of testacy or intestacy, takes the custody of the estate, appoints managing officers, directs them in the exercise of the power given to them by Statute as such, and judicially determines the existence of all facts necessary to the particular exercise of the power.

The executors and administrators discharge a function similar to that of assignees in insolvency.

In insolvency, the Court judicially determines the fact of insolvency, appoints the assignee elected by the creditors, and supervises him in the management of the estate.

If a claim is disputed, an adversary controversy must be had, involving a former trial, and issuing in a judgment. The judgment being only enforceable out of assets in the custody of the Court, cannot be enforced by execution; nevertheless it is a judgment decreeing the transfer of the property and only restrained from its usual operation through execution because the fund is in the custody of the law.

Distribution.

The proceedings in a Probate Court, preceding distribution, are not in any particular adversary proceeding, involving the assertion of a remedial right, and issuing in a judgment accomplishing a transfer of property rights.

The decree of distribution is equally devoid of that character.

The decree neither gives, creates, nor transfers any rights of property.

The proceedings resulting in the decree are in the nature of an inquisition to ascertain who are the persons upon whom the law has cast the succession and to what interests.

The decree, when pronounced, is simply declaratory. It announces what rights were given at the death by the law, and to

whom: It is a declaration which concludes all parties to the proceeding. But it does not purport, and in theory of law, does not create or transfer any rights. If in practice it thus operates, it is in consequence of error in the exercise of jurisdiction.

This is the established doctrine of the law. In Sayer's Admr. *vs.* Sayer, 1 C. E. Green (N. J. Eq.), 501, on appeal from a decree of distribution, it was assigned as error that the decree was made in favor of certain parties whose claims had been released or satisfied, and of parties who had not applied for the decree; and it was contended that the decree should only have been in favor of the kin applying and whose claims had not been released or satisfied (p. 508).

The Court say (p. 509): "But I am satisfied that the objection is not well founded and that the apparent difficulty results from mistaking the true *office and operation of the decree of distribution.* The decree is undoubtedly final and conclusive between the administrator and the distributees, as to the amount of each share and as to the party entitled to receive it. Thus, in an action against the administrator, for the recovery of a distributive share, it would be conclusive evidence of the amount to which the plaintiff is entitled.

* * * * * * * * * *

"*The office of the decree is simply declaratory of the rights of the legal representatives, or next of kin, in the estate of the intestate.* Beyond that, it professes not to decide, and in the very nature of the case it can decide nothing. The claims may be paid, or released or transferred, but these are questions with which the decree has no concern and which the Court have neither the power, nor the means of investigating. If the administrator should allege that he had paid the claim, how is that question to be settled? It can only be properly tried by suit."

"*Distribution gives to the distributee no new title* to the property,

but only ascertains the property to which his title shall attach as heir at law of the deceased."

Thompson *vs.* Thomas, 30 Miss., 152. See p. 158.

The interest vests at the death of decedent, and is but ascertained and declared by the decree.

Moore *vs.* Gordon, 24 Iowa, 162.

"It is a well established rule of law that the right to a distributive share of personal estate, under the statute of distributions is a vested interest, vesting in point of right at the time of the decease of the intestate, *although the persons to take,* and the amount to be received must be ascertained and determined by a decree of the Probate Court."

Davers *vs.* Dewes, 3 P. Wms.
Reeve, 57–71.
Bac. Abr., Tit. "Exec'rs and Admr.," 1.
2 Eq. cas. Ab., 444.
Ferrie *vs.* Public Admr., 3 Bradf. (N. Y.), 249.
Hayward *vs.* Hayward, 90 Pick., 517.
Kingsbury *vs.* Scovill, 26 Conn., 349.
Foster *vs.* Fifield, 20 Pick., 67.
Mills *vs.* Marshall, 8 Ind., 54.
Adams *vs.* Adams, 48 Metc., 170.

The function of the Probate Court so far as distribution is concerned, and the decree of distribution, are exactly analogous to the functions and final decree of confirmation of and in the proceedings of the United States Land Commission for the settlement of Mexican Land Claims.

The function of the proceedings before that commission, was to ascertain the fact of title by Mexican Grant, and in whom.

The commission found the fact of a grant and the decree confirming the grant, declared what property rights arose thereunder and in whom, without more. As a declaration, it was conclusive upon all parties with the exceptions mentioned, in the statute.

It gave no right, but merely established by a judicial record that a right of property had been given and to whom. It transferred no right. Had the grantee conveyed or otherwise affected their right, the assertion of the rights of others could only be had elsewhere in a regular and separate court of equity or law.

Test of the Jurisdiction of Probate.

The test by which to determine whether a proceeding properly belongs to probate or to law or equity is found in these essential characteristics of the two jurisdictions respectively.

It is but an application of the rule observed for determining when a case is at law or in equity where the two tribunals are distinct, as in the case of the United States Circuit Court.

The test is the *essential character of the case.*

See Van Norden *vs.* Morton, 9 Otto, 378–382.

Where the proceeding attempted in a Probate Court is not merely a judicial finding in a proceeding *in rem*, upon which the law as distinguished from the judgment of a Court gives certain property, or a certain power to the executors or administrators, or is not a direction to such officers of the Court, or is not a mere judicial declaration of the property rights theretofore vested by the law and of the persons in whom they were thus vested; but is a proceeding in which a remedial right to the transfer of property is asserted and a proceeding issuing in a judgment which of its own operation or as executed transfers such property, it does not belong to the province of administration, it is alien to the nature of ad-

ministration, and, if added to the jurisdiction of such Court, it is a jurisdiction at variance with and superadded to the immemorial and legitimate jurisdiction of that Court.

This test is exactly analogous to the test applied in many cases to determine whether a case is a case at law or in equity. When the remedial right is substantially a claim for damages, although the proceedings and claim have the superficial aspect of a proceeding in equity, the Court of Equity will refuse to exercise jurisdiction.

See as illustration:

Root Exr. *vs.* Lake Shore & Mich. South. R. R. Co., 15 Otto, 189–217.

On the same principle, although a partition proceeding superficially appears to be properly a probate proceeding, yet if, when the test is applied, it appears to be intrinsically and essentially different, and to be essentially a proceeding at law or in equity, it must be deemed outside the Probate jurisdiction designated and conferred by the Constitution, and the statute conferring it upon the Probate Court must be declared an unconstitutional transfer of jurisdiction from the constitutional legal tribunal.

Partition.

Partition is essentially an adversary proceeding in which *a remedial right to the transfer of property is asserted, and a proceeding issuing in a judgment amoving or transferring that property.*

Interest of Co-Tenant.

Although the title of each co-tenant is distinct, yet the possession is a unit.

Freeman, Co-tenancy and Partition, Sec. 86.

Each co-tenant has a right of possession to every part and parcel of the land.

Freeman, Co-tenancy and Partition, Sec. 250.

If ousted by his co-tenant of the whole or of any part, he can maintain ejectment.

Freeman, Co-tenancy and Partition, Sec. 290.

When not ousted, he has possession of every part. Each has a right and must join with his co-tenant in trespass against a stranger for injury to any part of the common property.

Freeman, Co-tenancy and Partition, Sec. 347.

He has a right to use every part.

Freeman, Co-tenancy and Partition, Sec. 251.

He may maintain against his co-tenant, trespass for the destruction of any part of the common property.

Freeman, Co-tenancy and Partition, Secs. 298–299.

See as to right to accounting for rents and profits received by a co-tenant.

Freeman, Co-tenancy and Partition, Secs. 274, 275, 276.

Where partition by judicial proceedings is had between two tenants in common, *an interchange of property rights is* accomplished by the judgment.

The right of possession to one moiety of the lands by metes and bounds is *divested* from one tenant and *transferred* to the other. He is compelled to accept, as a *substitute*, the right of possession theretofore *belonging to the other* tenant to the moiety by metes and bounds assigned to him. The property of which he is divested is

the title and right of possession of a tract of land awarded to the other, together with the incident rights, the right of entry, the right of user, the right to maintain trespass, etc.

The proceeding is strictly analogous to a proceeding in equity, to compel the specific performance of a contract to exchange land.

The contract of exchange being established, the law gives a remedial right to each party to the reciprocal exchange of the titles and rights of possession of the respective parcels of land. The judgment *ex proprio vigore* (under the laws of some States), or as executed, accomplishes the transfer.

In partition, the fact of the tenancy being established, the law gives a remedial right to the reciprocal exchange of the right of possession with the incident rights, to several distinct moieties of the entire tract and of the title to undivided moieties of such moieties.

The judgment accomplishes the change.

If in partition between tenants in common, no more than the right of possession to respective moieties were divested and transferred, nevertheless, the proceeding in partition would be a proceeding to enforce a remedial right, and issuing a judgment transferring property.

In the specific performance of a contract to execute a lease for five years, the judgment transfers the right of possession only, and not the title, yet it transfers property.

The right of possession to a certain definite parcel of land of which the tenant is divested in partition is a property in law and within the constitutional protection, even though it be subject to a joint possession by another. Any right arising in or out of land or personalty is property, and when transferred or sold in execution a property is transferred.

But there are two matters of law which establish beyond possibility of question or cavil that in partition, property consisting both of title

and right of possession is and must be transferred by the judgment in possession.

(1). This results from the fact that at common law partition could not be accomplished without the *transfer of an estate* by the voluntary act of the parties. And the judicial proceeding is a compulsory transfer by and through the judgment of a Court, substituted for the voluntary process by the parties.

At common law, a voluntary partition could only be accomplished in the manner required for the conveyance of landed estate.

While joint tenants at common law could release to each other, since each had the entire estate and thereby accomplish partition, tenants in common could only accomplish a partition *by livery of seizin* and not by a release. The former could partition by means of release; for it was only necessary to release a right. The latter could not, for it was necessary to transfer an estate, to wit: the undivided estate in the half set off to the other.

See Freeman, Co-tenantry and Partition, Sec. 396.
Co. Litt., 169 a.
Allnatt on Partition, 124–129.

At the present day, by virtue of State statutes, a deed executed as prescribed, is substituted for livery, yet the estate in common is not less, the same as at common law, than is the joint estate.

(2). That partition involves the transfer of an estate or property is evidenced by the theory and foundation of the proceeding in equity to compel the specific performance of a parol partition.

The statute of frauds is satisfied by the part performance accomplished by the actual severance of possession.

Equity will treat each tenant as possessed of the legal title to one-half of his allotment and of the equitable title to the other half of the same and will compel a conveyance by the co-tenant. This proceeds exclusively on theory that each tenant in common

can have a title to one half only, of any specified parcel of the whole tract, and can only acquire the other half through the medium of a conveyance.

Freeman, Co-tenantry and Partition, Sec. 402, and cases cited.

The estate of inheritance was cast upon the heirs of Horace Hawes, deceased, at the moment of his death. They took it and from that moment as tenants in common their title vesting then.

The proceedings in the probate court were proceedings for partition, in other words, for a reciprocal exchange of the title and right of possession to different moieties by metes and bounds of the land, not differing in essential value from proceedings at law or in equity.

This being the essential nature of partition, it appears clearly to be entirely foreign to the nature, scope and sphere of proceedings testamentary as known to the English law.

It can no more be held to be a legitimate part of the probate jurisdiction, which the California Legislature was at liberty to vest in the Probate Courts under the Constitution of 1863; than a power to hold a plea of debt, of trespass or ejectment or to entertain a proceeding for specific performance. If it be a legitimate part of such jurisdiction then the probate jurisdiction is an indefinite quantity whose boundaries cannot be certainly ascertained, and to whose limits there is no certain measure or test.

It is clear, also, that a power of partition is not analogous to distribution and is not a natural or legitimate extension of the power of distribution. Distribution but declares what rights have fallen by succession, and upon whom. It neither gives, creates nor transfers any property. It enforces no remedial right. Partition is not declaratory. It enforces a remedial right and transfers

property. It is as incongruous an element in the activity of a probate court as debt, covenant or specific performance.

Administration has exclusively to do with rights which spring out of the fact of succession. When it deals with other rights, it departs from its legitimate, conventional and customary sphere.

Partition deals with a remedial right springing out of the nature of the property and attaching thereto under a law other than that of succession.

The law of succession gives to the heirs (or kin) the estate of the decedent in the same quality as it existed in the latter. If there be more than one heir, it is given to them in equal shares as tenants in common.

It is the function of administration to declare the succession and the rights acquired thereby.

The estate in common has grown out of its nature, and attached to it by the general law of real estate the quality of partition and the right in each tenant to compel partition.

The enforcement of this right is not a proper administration matter. It stands upon the same footing with the right to recover possession, to an accounting of rents, to waste arising out of the nature of an estate cast by law upon the heirs.

Were one heir of several, to whom the land has been distributed by the Probate Court, to be in possession at the death, and to continue in possession, excluding the other heirs, it would not be within the jurisdiction of the Probate Court to compel, as an incident of distribution, the said heirs to let in the others. The estate of the heirs, with all its property and remedial rights, came to them by the law of succession; but the latter they must enforce in a general legal or equitable tribunal.

Ejectment is their remedy. Yet the right to be let into possession is of the same nature, stands in the same relation to the decedent, administration and distribution as the right of partition.

So should the estate in the ancestor and cast by the succession upon the heirs to be a vested remainder after a particular estate, the right to maintain waste against the tenant of the particular estate would be a right on the same footing as the right to partition. Yet the enforcement of that right would not belong to the administration.

On this independent ground the statutory and code provisions impeached in this case are unconstitutional.

The test constituted by the nature of the right enforced is applied in determining what is within the legitimate jurisdiction of the Probate Court.

In Illinois the Constitution gives the Probate Court jurisdiction in matters testamentary.

In Poole *vs.* Brown, 12 S. Car., 556.

A will directed the executor to retain the share of one of decedent's daughters during her life and pay her the interest. She filed a petition in Probate for an accounting.

The Appellate Court dismissed the petition, declaring that an action to enforce the trust was based primarily on the defendant's liability as a trustee, and the matter could not be properly deemed a matter testamentary. In other words, the right for an accounting was a right arising out of the estate as a trust estate.

Sub-division C.

Appropriateness.

The exercise of a power of partition by the Prabate Court, is in no sense appropriate. It is an incongruous, and alien activity as established by the foregoing discussion.

It is also inappropriate by reason of the inadequate powers of that Court. The Probate Court can only partition the legal interest

cast. It can determine no other title. It cannot adjust as can equity, the equities between the parties; making provisions for liens and incumbrances and variant values in different parcels of the property.

SUB-DIVISION D.

The Probate Court exercises under our law, more extensive powers in the administration of estates than did the ecclesiastical Courts of England.

For instance; American Courts, under statute authority, take jurisdiction of wills of real estate, and in all cases, whether of testacy or intestacy, land is assets to be administered upon. Yet no such powers were exercised by the ecclesiastical Courts.

American Courts render decrees of distribution in cases of testacy as well as of intestacy, yet the ecclesiastical Courts could render no such decree except in case of intestacy.

The American Probate Courts exercise also by authority of statute, more enlarged powers in the direction and control of executors and administrators.

It may be contended that if the jurisdiction of the ecclesiastical Court of England is to be taken as the measure of the jurisdiction which the legislature may constitutionally confer upon the Probate Court, then the acts of the California legislature, authorizing the Probate Court to take jurisdiction of wills of real estate, to administer upon real as well as upon personal estate, to render a decree of distribution in cases of testacy, as well as in cases of intestacy, to exercise powers of direction and control over executors and administrators, are unconstitutional, since they confer on that Court, powers not exercised by the corresponding Court of England.

It may be asserted that our whole argument leads to an absurdity.

It may be claimed, therefore, that the very basis of our argument, to wit: that the jurisdiction, which, under the California

Constitution of 1863, the legislature could confer upon Probate Courts, must be measured by the jurisdiction of the ecclesiastical Courts of England, is not tenable since it leads to such absurdity.

But this contention is based upon a confusion of two distinct matters, to wit: powers and jurisdiction.

There may be an enlargement of the powers of a Court without working an extension of jurisdiction. It confounds also, an extension of jurisdiction and of the subjects of a jurisdiction.

There may be an extension of the one, without an extension of the other.

LAND.

Ordinarily, administration in the English ecclesiastical Court did not extend to land, but this was not true to the largest extent.

Where the lands were situated in the American colonies, they went into the custody of the Court and of the executor or administrator, for administration (Toller's Law of Exr's, 416); so where the land was devised for the payment of debts (Toller's Law of Exr's, 415); so wills of mixed (real and personal) property, as well as wills of personal property, were subject to probate.

Toller's Law of Exr's, 70.

Lands when subject to administration, came within the exercise of the administration jurisdiction of those Courts, as in the case of lands in the colonies.

The lands were not ordinarily subject to administration, because they were not legal assets for the payment of any of the ancestor's debts except of those by specialty, when they were general assets, then they were assets in the hands of the executor.

Toller's Law of Exr's, ch. 8, p. 409.

Otherwise, they descended to the heir, subject not to debts generally, but only to the claims of specialty creditors.

It was not necessary to marshall them for the payment of debts or to support the family during an interval in which they were in the custody of the Court.

The family and general creditors had no claim to them.

American laws have made lands, as well as personalty and all lands, not merely those expressly devised for the payment of debts, or those situated in the colonies, legal assets for all purposes. They must be administered upon and jurisdiction in administration is in the Court of administration, to wit: the Court of Probate.

The jurisdiction of the ecclesiastical Courts, was to administer the assets of a decedent; and, where land, as when situated in the American colonies, was assets, it came into administration.

When our law makes all land assets, it does not thereby enlarge the jurisdiction of the Probate Court. Were the statute to enable the holder of an equitable title to recover in ejectment, it would not thereby enlarge the jurisdiction of a Court of Law. It would give the owner of an equitable title, a certain legal remedial right. The jurisdiction to enforce such rights, is in the Court of Law, and is neither enlarged nor restricted by the enlargement or restriction of the classes of titles possessing such remedial rights.

Formerly, equitable interests were not subject to execution at law. At present, in many of the States, they may be sold in execution, to satisfy a legal judgment. Yet this fact affords no grounds for maintaining that the jurisdiction of law has been thereby enlarged, this too, although at Common Law, a pretended sale would have been absolutely void.

Control over Executors and Administrators.

The enlarged control over executors and administrators, given by statute, does not involve an enlargement of the jurisdiction of the Probate Court. Its jurisdiction is to control and direct its officers in the discharge of their duties.

Its specific powers within that jurisdiction depend upon statutory authority. Its powers may be enlarged, yet its jurisdiction is unaffected, providing the new powers simply facilitate, and are directed to the regulation of its officers.

The statute may authorize a Court of equity, to decree specific performance in a case where it would not be allowable under the established rules of equity, for example, in the case of a contract to deliver specific merchandise.

Yet such extension of the power of equity, would not enlarge its jurisdiction. A Court of law might be authorized to entertain trespass in a case where no such remedy could be had at common law, as for instance, seduction, by the woman seduced, yet thereby, no enlargement of legal jurisdiction is accomplished.

Wills of Real Estate.

The exercise of jurisdiction over wills of real estate, does not enlarge the probate jurisdiction. When real estate becomes legal assets, it must go into the Probate Court for administration.

The will is the law of the particular case.

Its establishment is as necessary as the ascertainment in cases of intestacy of the law applicable. The jurisdiction of probate over wills, is to admit them to probate. When probate is necessary, the will cannot be recognized by any court of law or equity until probate has been had.

Williams on Executors, 6th Am. Ed., 454, pp. 388, 389.

When the law exacts the probate of wills of real estate, as a condition precedent to the recognition by a court of law or equity, it simply attaches a new condition to the operation of such instruments.

To obtain probate, it must go to a court having jurisdiction over

such matters, the Probate Court. The jurisdiction of the latter is not thereby enlarged.

Distribution in Case of Testacy.

Nor can it properly be said that the statutory power to render a decree of distribution in the case of testacy as well as intestacy enlarges the jurisdiction of the Court in a constitutional sense. It simply extends the cases in which the jurisdiction of the Probate Court may declare the course of succession.

The will is the law of the particular case; or to reverse the statement where a party dies intestate, the law makes its provisions as to distribution of his will.

Toller's Law of Ex., p. 384, and cases in Note "Y."

So far as jurisdiction is concerned, a decree is precisely the same, whether the law announced, is that made by the will for the particular case or that made by the general statute for all such cases, or whether the decree announces the estates vested by the will made by the act of the party or for him by the law.

In none of these cases is more done by the legislature than to grant to a tribunal whose powers are strictly dependent upon statute, more extended powers within its legitimate domain. So long as the powers granted consist in nothing more than powers over its officers and the estate in its custody for administration, or in powers to announce judicially the course of succession, the bounds of its legitimate jurisdiction are not passed.

The moment the Court is given power to entertain proceedings *to enforce remedial rights and to render judgments amoving or when executed accomplishing the amotion of property, that moment the boundaries of its jurisdiction are passed.*

VIII.

Wherever partition powers are or have been exercised by Probate Courts, in the United States, it has been by express authority of statute and as an alien power in the Probate Court.

Had a limited partition power been generally exercised by Probate Courts in the United States as an incident of distribution in the absence of statutory authorization, this fact might warrant the inference, that in the opinion of the bench and bar of America, such power belonged to the immemorial probate jurisdiction.

But where the power is exclusively statutory and so recognized wherever exercised, the fact of its exercise has no tendency to establish that it is a legitimate part of probate jurisdiction.

The power exercised by Probate Courts to partition, wherever it exists is based on statute. See

Alabama Laws of Ala., 1823, p. 333, Sec. 43.
Ala. Code, 1852, Sec. 670.
Rev. Code Ala., 1867, Sec. 3105.
Bryant *vs.* Stearns, 16 Ala., N. S., 307.
Coker *vs.* Pitts, 37 Ala. N. S., 693.

Connecticut:

Stat. of Conn., 1838, p. 234, Tit. 31, Ch. 1, Sec. 29.
Stat. of Conn., 1854, p. 502, Sec. 53.
Gates *vs.* Treat, 17 Conn., 388.

Indiana:

Rev. Stat., 1843, pp. 811, 812, Secs. 114, 115, 116.
Rev. St. Ind., 1881, Secs. 1186, 1187.
Shull *vs.* Kenyon, 12 Ind., 35.
Bennett *vs.* East, 7 Ind., 174.

Louisiana:

Hooke *vs.* Hooke, 6 La. O. S., 569. (420).

Maine:

Smith's Laws of Me., Vol. 1, p. 239, Ch. 50, Secs. 31, 38.
Rev. Stat. Me., 1840–41, p. 449, Ch. 108, Sec. 1.
Rev. Stat. 1883, p. 550, Secs. 8, 9.
Earl *vs.* Rowe, 35 Me., 421.

Massachusetts:

Provincial Stat. Mass., 1752, Ancient Charter, 594.
Stat. Mass., 1817, Ch. 190.
Gen'l Stat. Mass., 1860, p. 490, Sec. 14, p. 703, Secs. 48, 65.

"All the authority which the judge of probate has, upon this subject, is derived from the statute of 1817, Ch. 190."

Per Wilde, J. In

Wainright *vs.* Dorr, 30 Mass., 335.
Arms *vs.* Lyman, 22 Mass, 211.
Sigourney *vs.* Sibley, 38 Mass., 101.
Bemis *vs.* Stearns, 16 Mass., 200.
Jenles *vs.* Howland, 69 Mass., 536.
Gordon *vs.* Pierson, 1 Mass., 323.

Mississippi:

Stat. Laws of Miss. (Howard and Hutchinson's), p. 412, Sec. 89, p. 471, Sec. 14.
Smith *vs.* Craig, 10 S. and M., 447.
Currie *vs.* Stewart, 26 Miss. (4 Cush), 649.
Lum *vs.* Reed, 53 Miss., 77.

New Hampshire:

Comp. Stat. N. H., p. 393, Sec. 6.
Wadleigh *vs.* Janeen, 41 N. H., 501.

New Jersey:

Laws of N. J., 1821, p. 780, Sec. 13.

Dixon's Dig. Laws of N. J., p. 668, Sec. 10.

Den. Ex. Dem., Richman *vs.* Baldwin, 1 Zabriskie (N. J.), 397.

Curtis *vs.* Jenkyns, 1 Spencer (N. J.), 679.

Pennsylvania:

1 Brightly's Purdon's Dig. Laws of Pa., 1700–1872, p. 433, Sec. 138.

Bishop's App., 7 W. & S., 251.

Selfridge's App., 9 W. & S., 55.

Gardner's App., 4 Pa. St., 502.

Tennessee:

The County Court has jurisdiction of the probate wills.

Code Tenn., 1858, Sec. 2169.

Stat. Tenn., 1831, Heywood *vs.* Cobb's Revision, p. 103, Sec. 47.

The County, Circuit and Chancery Courts have concurrent jurisdiction.

Statutes Tenn., 1831, Revision, Heywood *vs.* Cobbs, 244.

Tenn. Code, 1858, Sec. 3266.

Wilcox *vs.* Cannon, 1 Caldwell, 370.

Vermont:

Laws of Vert., 1824, pp. 349, 350, Sec. 79, 83.

Rev. Laws Vert., 1880, Secs. 2252–2260.

Grice *vs.* Randall, 23 Vt., 243.

Wisconsin:

Rev. Stat. Wis., 1849, pp. 380–1–2.

Rev. Stat. Wis., 1858, pp. 605–6–7.
Rev. Stat. Wis., 1878, Secs. 3942–3955.

Minnesota:

Stat. of Minn., 1851, p. 260, Sec. 5.
Stat. of Minn., 1878, p. 597, Sec. 6.

South Carolina:

Stat. S. Car., Vol. 11, p. 64, Sec. 26 (Stat. 1839–49).
Stat. S. Car., Vol. 6, p. 248 (Stat. 1814–1838).
Rev. Stat. S. C., p. 573, Sec. 41.
Faust *vs.* Bailey, 5 Rich. (S. C. Law), 110.
Davenport *vs.* Caldwell, 10 S. C., 317.
Gales *vs.* Jeick, 2 Rich. (S. C. Law), 593.

It is recognized in all the cases, as statutory origin. In none are there any suggestions that it is an original or legitimate element or incident of administration.

Whenever the question of its relation to the latter jurisdiction has been noticed, it has been noticed as something foreign thereto, and as an alien jurisdiction conferred upon the Probate Court in consequence of some local views of convenience. See

Currie vs. Stewart, 4 *Cushman* (26 *Miss.*), 649.
Davenport *vs.* Caldwell, 10 S. C., 317, 347–8.
Smith *vs.* Craig, 10 S. & M. (15 Miss.), 447.
Wainwright *vs.* Dorr, 30 Mass., 333.
Grice *vs.* Randall, 23 Vert., 243.

IX.

(*a*) The sole question in this case is, were the proceedings in partition in the Probate Court of San Francisco without jurisdiction?

The cases presented by defendant (see *Infra*, pp. 45, 46, 47), adjudging in various forms that the proceedings of Probate Courts are as conclusive against collateral attack as the judgments of courts of general jurisdiction are inapplicable.

Of course, if the Court has jurisdiction of the proceedings and the persons, whether it be a Court of inferior or general jurisdiction, the decision of the Probate Court is conclusive except on appeal.

Those cases all proceed on the assumption that the Probate Court had jurisdiction in the States in question, and the presumption was correct.

In this case and in California the contention is that the Probate Court had no jurisdiction—that the proceedings were absolutely void and not merely voidable; and it is an elementary principle that such proceedings are nullities and subject to collateral as well as direct attack.

Cases of the class mentioned are therefore irrelevant. They can have no materiality except as showing the practice in the other States, and upon that score are immaterial, as appears from the discussion herein following.

(*b*) In the statutes in which a partition power is or has been conferred upon Probate Courts, *there has been no constitutional distribution of jurisdictions and no constitutional prohibition against such legislative disposition of the partition jurisdiction.*

In the cases* relied upon by the defendant in this action, no question arose or was suggested in the arguments of counsel or in the opinions of the various Courts as to the constitutionality of statutes giving partition jurisdiction to Probate Courts.

*To wit:

Bryant *vs.* Stearns, 16 Ala. R. N. S., 302.

Coker *vs.* Pitts, 37 Ib., 693.

Gates *vs.* Treat, 17 Conn., 389.

Schull *vs.* Kennon, 12 Ind., 35.
Bennett *vs.* East, 7 Ib., 175.
Mason *vs.* Mason, 12 La. O. S., 742.
Badon *vs.* Foucher, 15 Ib., 290.
Hooke *vs.* Hooke, 6 Ib., 569.
Potter *vs.* Webb, 2 Me., 236.
Earl *vs.* Rowe, 35 Ib., 415.
Cogswell *vs.* Reed, 12 Ib., 198.
Dean *vs.* Hooker, 31 Ib., 107.
Furlong *vs.* Soule, 39 Ib., 123.
Pierce *vs.* Irish, 31 Ib., 254.
Clark *vs.* Pishon, 31 Ib., 503.
Potter *vs.* Hazard, 93 Mass., 187.
Arms *vs.* Lyman, 22 Ib., 211.
Sigourney *vs.* Sibley, 38 Ib., 101.
Bemis *vs.* Stearns, 16 Ib., 200.
Jenks *vs.* Howland, 69 Ib., 536.
Gordon *vs.* Pierson, 1 Ib., 323.
Gaines *vs.* Smiley, 7 Sm. and Marsh, 53.
Campbell *vs.* Wallace, 12 N. H., 263.
Kelley *vs.* Kelley, 41 N. H., 507.
Den. Ex. Dem., Richman *vs.* Baldwin, 1 Zabs. (N. T.), 395.
Curtis *vs.* Jenkyns, 1 Spenser (N. J.), 679.
State *vs.* Mayhew, 4 Hals. (N. J.), 70.
In re Estate Isaac Coombs, 4 Hals. (N. J. Ch.), 79.
Mehaffy *vs.* Dobbs, 9 Watts (Pa.), 363.
Bishopp's App., 7 W. & S. (Pa.), 251.
Hise *vs.* Geiger, 7 Ib., 273.
Groff *vs.* Groff, 14 S. & R. (Pa.), 183.
Selfridge's App., 9 W. & S. (Pa.), 55.
McPherson *vs.* Cunliff, 11 S. & R. (Pa.), 422.

Bavington *vs.* Clark, 2 Penn., 115.
Gardner's Estate, Waln's App., 4 Pa. St., 502.
Herr *vs.* Herr, 5 Pa. St., 428.
Eells Est., 6 Ib., 457.
Painter *vs.* Henderson, 7 Pa. St., 48.
Lair *vs.* Hunsicker, 28 Pa. St., 115.
Ihnsen *vs.* Ormsby, 32 Ib., 198.
Merklein *vs.* Trapnell, 34 Ib., 42.
Snyder's App., 36 Ib., 166.
Dresher *vs.* Allentown Water Co., 52 Pa. St., 225.
Harlem *vs.* Langham, 69 Ib., 235.
McClure *vs.* McClure, 2 Harris (Pa. St.), 134.
Wilcox *vs.* Cannon, 1 Coldi. (Tenn.), 370.
Grice *vs.* Randall, 23 Vt., 242.
Gillett *vs.* Treganzd, 13 Wisc., 472.
Tryon *vs.* Farnsworth, 30 Wisc., 577.
Simpson *vs.* Cook, 24 Minn., 180.
Tompkins *vs.* Tompkins, 1 Story C. C., 547.
Kieley *vs.* McGlynn, 21 Wall, 503.
Shaw *vs.* Shaw, 4 Cr. Cir. Ct., 715.
Lewis *vs.* Pratt, 2 Wharton (Pa.), 81.
Vick *vs.* Vicksburg, 1 How. (Miss.), 444.
Wyman *vs.* Campbell, 6 Porter (Ala.), 219.
Fletcher *vs.* Sanders, 7 Ch. Dana, 345.
Chess's Appeal, 4 Pa. St., 52.
Green *vs.* Creighton, 10 Sm. & Marsh, 159.
Mitchell *vs.* Kintzer, 5 Pa. St., 216.
Whiteside *vs.* Whiteside, 20 Pa. St., 474.
Witham *vs.* Cutts, 4 Me., 28.

They are not, therefore, express authorities to the effect that partition jurisdiction is a part of a probate jurisdiction, when such

jurisdiction is vested by a constitution, or authorized by that instrument to be vested by the Legislature in Probate Courts.

They are not by implication such authorities.

Did constitutional provisions exist in the several States where statutes empower Probate Courts to make partition expressly or impliedly prohibiting the Legislature from vesting any other than probate jurisdiction in such Courts; then the fact, that such statutes had been enacted in a dozen States, and the power given had been exercised for half a century, without the constitutionality of such statutes ever having been questioned by the bar or bench, would afford an argument in support of the proposition that such partition power was a legitimate part of probate jurisdiction.

Or, the acquiescence in the constitutionality of such statutes, might have become so inveterate an error, that, in the light of that error, constitutional provisions, distributing jurisdictions, would be presumed to speak.

But neither position can be true as to partition, for, as stated at the head of this Section; in the States where such partition power has been conferred upon probate Courts, there has been no constitutional distribution of jurisdictions and no constitutional prohibition against such a grant.

In the absence of a constitutional distribution of jurisdictions, and in the absence of an express or necessarily implied prohibition, it is beyond doubt, that the legislature can vest a particular jurisdiction in any Court it may appoint.

For the purpose therefore, of determining the constitutionality of the California Statute, a distinction must be taken between the decisions of those States where such constitutional distributions of jurisdictions and prohibitions exist and of those States where they do not. The legislation, practice and decisions of the latter must be laid aside.

That distinction to the constitutional provisions, relating to the judiciary was taken and applied in the South Carolina case of Davenport *vs.* Caldwell, 10 S. Car., 317, where the very question involved in the case at bar was decided.

In that State, from the year 1824 down to the adoption of the constitution of 1868, the Court of the ordinary, exercised the power to partition land among heirs or devisees.

The power was given by a statute of 1824 (Stat. of S. Car., vol. 6, p. 248), which recited as the occasion that "the usual proceedings in the Courts of equity" are found to be "unnecessarily tedious and expensive."

The power of partition was continually exercised by that Court and such proceedings were the frequent subject of review, by the Appellate Courts. See

Gates *vs.* Irish, 2 Rich. Law, 593.

Faust *vs.* Bailey, 5 Ib., 110.

The constitution of 1798, provided, simply, that "The judicial power shall be vested in such superior and inferior Courts of law and equity as the legislature shall from time to time direct and establish."

Stat. of S. Car., Vol. 1, p. 189, Art. III, Sec. 1.

The constitution of 1868 however, provided for specified courts, and among them, for a Probate Court (Stat. S. Car., Vol. 14, p. 14, Art. 4, Sec. 1); and, distributed the jurisdictions, providing (ib. p. 16, Art. 4, Sec. 20); that the Court of Probate should have "jurisdiction in all matters *testamentary and of administration* business, appertaining to minors and the allotment of dower, in cases of idiocy and lunacy, and persons non compos mentis."

The revised Statutes of 1872 conferred the partition power on the Probate Court (Sec. 41, Rev. Stat., 573).

In the cases of Davenport *vs.* Caldwell, 10 S. Car., 317, the constitutionality of that Act was impugned, on the ground that partition was not "a matter testamentary or of administration."

The Court decided in support of the contention, and took the distinction between the old and new constitutions, saying, p. 348:

"The Act (Sec. 41, Rev. Stat., 573) does undertake to confer such jurisdiction, but * * * to determine the limits of the jurisdiction of the Court of Probate, we must look to the constitution, by which instrument, jurisdiction is conferred. *In this respect, the constitution of 1868* differs widely from that of 1790. By the latter, the judicial power of the State was "vested in such superior and inferior courts of law and equity as the legislature shall from time to time direct and establish," *and it was left to the Legislature to distribute the judicial powers amongst the* several Courts so established; while by the former (the constitution of 1868) the judicial power is vested in the several courts named * * * but *the jurisdiction of each of those named, among them the Court of Probate, is defined and specified.*"

In Pennsylvania and Tennessee, there is express and affirmative constitutional authority for vesting partition or other equity jurisdiction in Probate Courts.

In the one, the legislature may vest chancery jurisdiction in such courts as it sees proper. In the other, the constitution provides for a supreme, and for inferior courts, and provides that the jurisdiction of the latter "shall be regulated by law."

In Rhode Island, the jurisdiction of all courts is to be prescribed by law. In Ohio, the legislature is authorized to vest other jurisdiction in the Probate Court.

In Wisconsin and Michigan, the legislature is empowered to prescribe the jurisdiction, as well as the powers and duties of the Probate Court.

This appears from the respective constitutional provisions.

PENNSYLVANIA: The constitution in 1790, in force until the adoption of a new constitution in 1874, provided in Art. V, Sec. 1 (Brightley's Purdon's Dig. 1700-1872, p. 26), for a Supreme Court, Court of Common Pleas, Orphans' and other Courts.

As Art. V, Sec. 6 (ib. p. 27) provided, that the Supreme Court, and several Courts of Common Pleas should have certain specified powers (not including partition); "and the legislature shall vest in the said courts such other powers to grant relief in equity as shall be found necessary, and may from time to time enlarge or diminish those powers, *or vest them in such other courts as they shall deem proper for the due administration of justice.*

Under the Constitution of 1874, the power of the legislature as to the Court of Common Pleas, remains unchanged (Const. '74, Art. V, Sec. 20; Brightley's Purdon's Dig., 1700–1872, p. XIV); while in Sec. 22, Art. V (Ib. p. XIV) provision is made for separate Orphans' Courts (from the Common Pleas); in counties with more than 150,000 population, "which Court shall exercise all the *jurisdiction* and *powers now vested in, or which* may hereafter, be conferred upon the Orphans' Court; and thereupon, the jurisdiction of the judges of the Common Pleas in Orphans' Court proceedings shall cease."

TENNESSEE: The first Constitution of Tennessee, adopted in 1796, and in force until 1834, provided (Art. V, Sec. 1) that; "the judicial power of the State shall be vested in such superior and inferior Courts of law and equity as the legislature shall from time to time direct and establish" (Laws of Tenn., Scott's Ed.? vol. 1, p. 532), and made no disposition of jurisdictions.

Const. 1834 provided (Art. VI, Sec. 1): "The judicial power shall be vested in one Supreme Court; in such inferior Courts as the legislature shall from time to time * * * establish * * * and in justices of the peace."

Code of Tenn., 1858, p. 42.

And (Art. VI, Sec. 8) "The jurisdiction of such inferior Courts as the legislature may from time to time establish, shall be regulated by law."

Code '58, p. 44.

The Constitution of 1870 provides for Supreme, Circuit, and inferior Courts (Art. VI, Sec. 1; Code Tenn., '84, p. LXXXVI), and provides that the existing jurisdiction shall continue until changed by law.

Art. VI, Sec. 8.

Code '84, p. LXXXVIII.

RHODE ISLAND: The Constitution of Rhode Island provides (Art. X, Sec. 1) "that the judicial power * * * shall be vested in one Supreme Court and in such inferior Courts as the general assembly may * * * establish."

And (Art. X, Sec. 2) "the several Courts shall have such jurisdiction *as may from time to time be prescribed by law.*"

OHIO: The Constitution of Ohio, after granting to the Probate Court several specified jurisdictions, provides that it shall have "such other jurisdiction as may be provided by law.

Const. 1802, Art. III, Sec. 5.

Chase's Stat. of Oh., Vol. 1, p. 79.

Const. 1850–51, Art. IV, Sec. 7.

Hough's Am. Const., Vol. 2, p. 164.

WISCONSIN: The Wisconsin Constitution of 1848 provides, Art. VII, Sec. 2 (See Hough's American Const., vol. 2, p. 508–9), for a Supreme, for Circuit Courts, Courts of Probate, Justices of the Peace and municipal and inferior courts, and in Sec. 14, Art. VII, "There shall be chosen in each County, &c., a judge of probate

* * * * *whose jurisdiction, powers and duties shall be prescribed by law.*"

Hough's American Const., vol. 2, p. 511.

MICHIGAN: The Michigan Constitution of 1850, after providing for various Courts (Art. VI, Sec. 1), and providing that the Circuit Courts should have jurisdiction in all matters civil and criminal, not excepted by the constitution and not prohibited by law (Art. VI, Sec. 8), provides that "*the jurisdiction, powers and duties*" of the Probate Court "*shall be prescribed by law.*" Art. VI, Sec. 13.

Hough's Am. Const., vol. 1, p. 679.

In Maine, Vermont, Connecticut and Massachusetts and New Hampshire, there has been no constitutional distribution of jurisdiction at all. The constitutional provisions either specified the Courts without designating their jurisdiction, or generally authorized the legislature to erect courts of justice.

This appears from the following constitutional extracts:

MAINE: Constitution of 1819, in force in 1883, (Art. 6, Sec. 1) (Rev. Stat. Me., 1883, p. 47), provides, only, that "The judicial power of this State shall be vested in a Supreme Judicial Court and such other courts as the legislature shall from time to time establish."

VERMONT: The Vermont Constitution adopted in 1793 and in force in 1880, simply provided that courts of justice should be maintained in every county.

Ch. II, Sec. 4, Rev. Law Vt., 1880, p. 35.

CONNECTICUT: Constitution of 1818, Art. V, Sec. 1 (Gen'l Stat. Conn. 1866, p. LI). "The judicial power of the State shall be vested in a Supreme Court of Errors, a Superior Court, and such

inferior courts as the general assembly shall, from time to time, ordain and establish: the power and jurisdictions of which courts shall be defined by law."

MASSACHUSETTS: The Constitution adopted in 1780 and in 1882, provided (Part II, Ch. I, Sec. 3, see Public Stat. Mass. 1882, p. 22): "The general court shall forever have full power and authority to erect and constitute judicatories and courts of record, or other courts, * for the hearing * of all manner of crimes * * pleas * * actions * * causes and things whatsoever, * * * whether the same be civil or criminal * * * *."

No Courts are created and no jurisdictions in any way disposed of.

NEW HAMPSHIRE: Part II., Art. IV., N. H. Const. of 1792, in force in 1867 (See Gen'l Stat. N. H., 1867, p. 19), is identical with the provision in the Massachusetts Constitution.

Part II., Art. 80, provides that "all matters relating to the probate of wills and granting letters of administration shall be exercised by the Judges of Probate in such manner as the Legislature have directed or may hereafter direct."

INDIANA: The Constitution of Indiana provides for a Supreme and for Circuit and inferior Courts.

It provides that the Circuit Courts shall have law, equity and criminal jurisdiction in such cases and in such manner as shall be prescribed by law." It is silent as to the jurisdiction of inferior Courts. It is competent for the Legislature to vest some jurisdiction in inferior Courts, and the Constitution prescribes no restrictions.

Indiana Constitution, 1816, Art. V., Sec. 1 (Rev. Stat., 1843, p. 53): "The judiciary power of this State, both as to matters of law and equity, shall be vested in one Supreme Court, in Circuit Courts and in such other inferior Courts as the General Assembly may, from time to time, direct and establish."

Ib., Sec. 3, provides that the Circuit Courts "shall have common law and chancery jurisdiction, as also complete criminal jurisdiction in all such cases, and in such manner as shall be prescribed by law."

The provisions of the constitution in force in 1881, are identical in effect, although briefer in phraseology.

Const. Ind., 1851, Art. 7, Secs. 121, 168.
Rev. Stat. Ind., 1881, pp. 25–26.

KENTUCKY: The first Constitution of Kentucky prescribes the Courts of the Commonwealth, but is silent as to the jurisdictions they should respectively exercise, leaving the distribution of the same to the Legislature. The new constitution expressly provides that the jurisdiction shall be prescribed or regulated by law.

The Kentucky Constitution of 1800 provided only, that "the judicial power * * * shall be vested in one Supreme Court * * * and in such inferior Courts as the General Assembly may * * * establish."

Art. IV., Sec. 1.
See Stat. Laws of Ky., 1834, Vol. 1, p. 61.

And "there shall be established in each county * * * a county Court."

Art. IV., Sec. 5.
Ib., p. 62.

The Constitution of 1850, provided that "the judicial power * * * shall be vested in one Supreme Court * * * the Courts established by this Constitution and such Courts inferior to the Supreme Court, as the General Assembly may * * * establish."

Art. IV., Sec. 1.
Hough's Am. Const., Vol. 1, p. 449.

County and Circuit Courts are established by the constitution.

Art. IV., Sec. 16, Sec. 29.

Ib., pp. 452–53.

Section 17, Art. IV., provides: "The jurisdiction of (the Circuit Court) shall be and remain as now established, hereby giving to the general assembly *the power to change or alter it.*"

Ib., 452.

And Sec. 33, Art. IV: "The jurisdiction of the County Court shall be regulated by law; * * *."

Ib., 454.

NEW JERSEY: The distribution of jurisdictions was left open by the constitution of New Jersey.

Art. VI., Sec. 1, Constitution of 1844, Rev. Laws N. J., 1709–1877, p. XXIV provides that:

"The judicial power shall be vested in a Court of Errors * * * a Court of Chancery, a Prerogative Court, a Supreme Court, Circuit Courts and such inferior Courts as now exist or may * * * be ordained * * * by law.

Art. VI, Sec. 4, Ib. p. XXVI, provides:

(1) "The Court of Chancery shall consist of a Chancellor.

(2) "The Chancellor shall be the ordinary or surrogate general and judge of the Prerogative Court."

Art. VI, Sec. 5, Subd. 2 (Ib. p. XXV) provides that the Circuit Courts shall have civil common law jurisdiction within the county, concurrent with the Supreme Court.

There are no provisions specifying the jurisdiction to be exercised by the several Courts other than as to the Circuit Court and as to certain appellate powers.

Up to 1844, the Constitution of 1776 was in force and it contained no distribution of jurisdictions.

Stat. of N. J., 1847, pp. XV–XIX.

TEXAS: The district Courts are given indiscriminately, jurisdiction over criminal cases, suits to recover penalties, for divorce, all suits * * * whatever, both at law and in equity where the matter in controversy amounts to $100, over the probate of wills, appointing guardians, settling accounts of executors, etc., and "for the transaction of all business appertaining to the estates of deceased persons, etc., for the settlement, *partition* and distribution of such estates."

Texas Const., Art. V, Sec. 7.

Hough's Am. Const., p. 375.

No district courts are erected by this provision. A commingled jurisdiction of all kinds is given to the district courts, and if by statutory authority, probate and equity powers are exercised on the same action, it is no more than what is done under the California Code in the administration of legal and equitable remedies in the same action.

LOUISIANA: The jurisdictions of the various kinds, are confused and blended in the Parish and District Courts by the Louisiana Constitution and are each given such "*further jurisdiction * * as shall be conferred by law.*"

La. Const., Tit. IV, Arts. 83–87.

Hough's Am. Const. Vol. 1, p. 491–2.

MISSISSIPPI: The Mississippi Constitution specifies jurisdictions in probate "in all matters testamentary and of administration," in orphans' business, in allotment of dower, etc., as the jurisdiction of the Probate Court. In Smith *vs.* Craig, 10 S. & M., 447, the

Supreme Court of that State declared that *an act conferring partition jurisdiction upon a Probate Court would be void.*

The Mississippi Courts, however, hold that a statutory power of partition, where part of those to whom land descends are minors, is constitutional, but this is apparently on the ground that such a power comes within the distinct and separate jurisdiction given by the constitution under the designation of jurisdiction "in orphans' business."

Lum *vs.* Reed, 53 Miss., 77.

The Mississippi Constitution of 1832, Art. IV (Rev. Code 1857, p. 29-30) provides, Sec. 1:

"The judicial power of this State shall be vested in one High Court of Errors and Appeals and in such other Courts of law and equity as are hereafter provided for in this Constitution."

Sec. 14: "The Circuit Court shall have original jurisdiction in all matters civil and criminal within this state; but in civil cases only, when the principal sum in controversy exceeds fifty dollars."

Sec. 16: "A separate Superior Court of Chancery shall be established with full jurisdiction in all matters in equity."

Sec. 18: "A Court of Probates shall be established in each county and with jurisdiction in all matters testamentary and of administration, *in orphans' business* and allotment of dower in cases of idiocy and lunacy, and of persons *non compos mentis* * * * ."

The Constitution in force in 1880 contained the same provisions, except that it provided for the discharge of the jurisdiction theretofore existing in Probate Courts by the Court of Chancery.

X.

But it is argued that the statute simply brings into this State the practice and usage in the matter of partition by Probate Courts which generally prevail in other States. It is urged by inference

that the Constitution, in providing probate jurisdiction in the Probate Court, contemplated that jurisdiction not in its purity and simplicity, as derived from Great Britain, but as amplified in America. It is supposed that the jurisdiction in question has been remodelled in America by the practice of the States and partition power incorporated into it, and that our Constitution speaks with reference to that American probate jurisdiction.

But to adopt such principle is to violate all the rules of construction to enable the significance of constitutional provisions to vary with variable custom, and to enable a judicial remodelling, according to the whim of the times, of our Constitutions, destructive of the rigidity and integrity of our constitutional framework of government.

It is not true that there is an American probate jurisdiction different in essential quality and nature from that of the Courts of administration of England.

It is true that a partition power has been expressly conferred upon Probate Courts in certain States; but this has not been done in all, and, in fact, has been done in less than a majority.

Such a power has been so conferred in Maine, Massachusetts, Connecticut, Vermont, Pennsylvania, New Hampshire, New Jersey, Alabama, Rhode Island, Indiana, Ohio and Tennessee.

In Mississippi the Court, by virtue of its constitutional jurisdiction over orphans' business, can partition an estate where some of the tenants in common are minors.

In Texas and Louisiana, the same Court has constitutional jurisdiction over matters at law and in equity and of administration.

In Kentucky and North Carolina, the same Court, is a Court of law and equity and a Court of Probate, but the partition power is not given to it as a Probate Court.

In South Carolina, although up to 1874, the Probate Court has a statutory partition power, yet it is held that such power is not a part of the probate jurisdiction.

But no such power has been conferred upon the Probate Court in New York, Virginia, West Virginia, Georgia, Florida, Missouri, Iowa, Illinois, Arkansas, Kansas, Nebraska, Colorado and Maryland.

In the latter State jurisdiction to partition the estates of decedents was given to the county courts by the statute of November 1786, Ch. 45, Sec. 8; while under the act of February 1777, Sec. 8, the orphans' court had exclusive probate jurisdiction. This distinction continues at the present time.

Revised Code, Maryland, 1878, pp. 430–432 and pp. 407–8.

The case of Shaw *vs.* Shaw, 4 Cranch, C. C., 715, cited as a case in which a decree of partition by a Maryland Probate Court was sustained, was a case in which a partition by a *county court* under the act of 1786, Ch. 45, Sec. 8, was sustained.

In these latter States, the Probate Courts exercise probate jurisdiction unmarred by the addition of this foreign element.

This formidable array of States that have refused to yield to the assumed remodelling of the nature and scope of the probate jurisdiction as known to our jurisprudence, cannot be disregarded in determining what constitutes the American probate jurisdiction.

If usage, under any circumstances, could enlarge the probate jurisdiction, it could only be a usage general, uniform and long continued. The usage invoked in this case is modern in its origin, variant in its character and prevalent in a minority of the States only. It is illogical to assume that the California Constitution speaks with reference to that usage, and not with reference to that recognized and immemorial jurisdiction which has been borrowed from England and in every American commonwealth vested in distinct Courts.

Furthermore, where this usage prevails, the partition power has not been deemed a legitimate part of the probate jurisdiction. There is no suggestion in the legislation conferring such power,

or in the opinions of Courts sustaining its exercise, that an American probate jurisdiction has been framed, into which that power has been incorporated.

In those very States, such assumption is repudiated.

It is declared, in Mississippi, to be no legitimate part of the probate jurisdiction, (Currie *vs.* Stewart, 4 Cushman, 26 Miss., p. 649), and has been decided to be beyond the limits of jurisdiction over matters testamentary and of administration.

Smith *vs.* Craig, 10 S. & M., 447.

In South Carolina, where the power was expressly vested in Probate Courts in 1824 and thereafter exercised until the adoption of a new constitution in 1874; it was held under the latter constitution not to be included within a grant of jurisdiction over matters testamentary and of administration.

See *Ante*, pp. 49, 50.

Yet if the contention is sound, that the American probate jurisdiction includes a power of partition, and that a constitution speaks with reference to such remodelled jurisdiction, it ought to be especially true in the case of a State where for over a half a century, the usage prevailed.

It is an extraordinary proposition that a constitutional term dealing with such a subject as the jurisdiction of Courts, can be loosened from its moorings in the Anglo-American jurisprudence by a usage in the minority of the States, and assume a new significance and import, based upon a modern and exceptional practice. This too, when the result is to open up all constitutional terms to judicial enlargement so far as their meaning is concerned, in obedience to the whim or opinion of the times as to policy.

But other difficulties meet the contention.

What is the nature of this partition power, which has become a part of the probate jurisdiction?

It is not, and cannot be contended to be a partition power co-extensive with that of law or equity, for no such extensive power has been conferred or exercised by Probate Courts in any State.

By the usage of what State or States is it to be determined, for the usage varies among the States?

In some States partition may be had among heirs and devisees only, and not among them and others, for instance Louisiana.

Badon's Heirs *vs.* Foucher, 15 La. O. S., 290 (455).

In others, between heirs or devisees, and the assignees of some of them.

Gen'l Stat. of Mass., 1860, p. 703, Secs. 51–54.

Rev. Stat. of Wis., 1849, pp. 380–1–2.

In some States, only where there is no dispute as to the title or interest.

Gen'l Stat. of Mass., 1860, p. 703, Sec. 60.

Comp. Stat. of New Hampshire, 1853, p. 393, Sec. 6.

In other States, the court can partition even where the title is disputed and its decision is conclusive upon an adverse title.

Faust *vs.* Bailey, 5 Rich. S. Car. Law R., 107.

And in some States, such partition is conclusive upon no other title than that cast by the law.

Grice *vs.* Randall, 23 Vermont, 243.

Conclusion.

On no assumption, can it be maintained, as a matter of law, that the power of partition was a part of the probate jurisdiction, which it was competent for the legislature to vest in Probate Courts under the California Constitution of 1863.

That power was indisputably no part of the probate jurisdiction derived from England.

Wherever the question has been decided, the American courts have pronounced it no part of the probate jurisdiction, as specified by the constitutions.

On principle, it belongs to the jurisdictions at law and in equity, and not to probate.

Wherever such a power has been exercised in America, by Probate Courts, it has been by virtue of express statute, and in all such cases the constitutional power to enact such statutes, existed in the Legislature, by reason of the absence of express or implied constitutional prohibitions.

On no substantial principle can the Constitution of California be made to speak with reference to the variant practice of a minority of the States, so as to make the probate jurisdiction conferred by that Constitution comprehended that statutory power of partition deposited in Probate Courts in those States.

The defendant in the above case is entitled to no indulgence at the hands of the Courts, especially at the expense of marring the American jurisprudence and weakening the constitutional bulwarks by which private property is protected.

The partition proceedings were had while the plaintiffs were minors and without sufficient discretion to protect their own interests.

The defendant acted with his eyes open, and concerning the property of infants.

He took it with notice of the plaintiffs' rights. His pretended title was based in a wrong. He can claim no prescriptive right to have their title extinguished, because relying on the strength of his possession, he has made outlays or incurred obligations.

There is no doubt, in our judgment, basing our opinion on the foregoing reasonings and authorities, that the partition proceed-

ings in the Probate Court of the City and County of San Francisco, under which the defendant claims title, were absolutely void *ab initio*, and that the plaintiffs are entitled to recover, as prayed for in their complaint.

J. C. BATES,
JOHN A. CAMPBELL,
Attorneys for Plaintiffs in Error.

Office Supreme Court U. S.
FILED
MAR 24 1890
JAMES H. McKENNEY,
CLERK.

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BRIEF OF DEFENDANT IN ERROR.

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IN THE SUPREME COURT

OF THE

UNITED STATES.

JAMES A. ROBINSON ET AL., *Plaintiffs in Error,* *vs.* JAMES G. FAIR, *Defendant in Error.*	No. 212. Error to U. S. Circuit Court, Ninth Circuit, District of California.

BRIEF OF SAMUEL M. WILSON, OF COUNSEL FOR THE DEFENDANT IN ERROR.

This is an action, usually called ejectment, brought by the plaintiffs in error for the recovery of two undivided third parts of the fifty-vara lot No. 205—137½ feet square—situated in the City and County of San Francisco, California, and of great value.

The trial was had before the Hon. Circuit Court without a jury, the same having been duly waived by the parties, and special findings of facts and conclusions of law were made and filed, which determined the issues in favor of the defendant.

Besides the judgment-roll, the transcript con-

tains a bill of exceptions, setting forth the alleged errors upon which the plaintiffs in error rely.

PLAINTIFFS' CLAIM OF TITLE.

Both parties claim title under one Horace Hawes, Senior, who died intestate on the 12th March, 1871, seized in fee of the premises, together with a large amount of other valuable property in San Francisco and in the adjoining County of San Mateo. (Tr., p. 7.) He left, surviving him, his widow, Mrs. Caroline Hawes, and two children—the original plaintiffs herein, Caroline C. Robinson wife of James A. Robinson, and Horace Hawes, Junior. (Tr., p. 8, Finding V.) After judgment for defendant, Horace Hawes, Junior, also died, and his executrix, Mrs. Eugenie Hawes, was substituted, and now joins with Mrs. Robinson in the writ of error. (Tr., p. 48 to 53.) The original plaintiffs, never having acquired the interest of their mother, Mrs. Caroline Hawes, widow of Horace Hawes, Sr., seek to recover two undivided thirds of the lot as heirs of their father, each claiming an undivided one-third under the California Statute on the subject of "Succession." (Civil Code, Sec. 1386, Sub. 1.)

DEFENDANT'S CLAIM OF TITLE.

The defendant likewise claims title under Horace Hawes, Senior.

His estate was administered upon in the Probate Court of the City and County of San Francisco, and was ultimately distributed and partitioned to his widow and two children referred to—the widow receiving in severalty the lot in controversy and also other property, and the children receiving each in severalty other lots and tracts of land in San Francisco and San Mateo Counties. (Tr., pp. 10, 19 to 23.)

On this distribution and partition, which was made on the 19th April, 1885, the widow and children respectively as found by the Court, "entered into the possession and enjoyment in severalty of the several tracts and parcels of land so set apart and allotted to them respectively in severalty as aforesaid and they and each of them, and their and each of their grantees respectively, have ever since and still do retain the possession and enjoyment of said several tracts and parcels of land in severalty as set apart and allotted to them in severalty in said decree of partition aforesaid."

(Tr., p. 11, Finding XX.)

On the 24th May, 1875, Mrs. Caroline Hawes, widow, being in sole and exclusive possession of the fifty-vara lot in controversy, granted, bargained, sold and conveyed the same, by deed with full covenants of warranty, to James C. Flood for $300,000.00, gold coin, to her paid and she delivered to him possession. (Tr., p. 11, Finding XXII.)

Mr. Flood remained in exclusive possession until the 21st August, 1876, when for the same consideration he sold and conveyed the lot to the defendant, Mr. Fair, who ever since has been in possession. Since his purchase he has erected upon the lot substantial improvements of the value of several hundred thousand dollars. (Finding XXVI, p. 12, Tr.)

No complaint has ever been made that the partition of the estate of Horace Hawes, Senior, was not fairly and honestly made; there is no pretense that the portions of land allotted to each of the children were not of equal value to that allotted the widow. But the son and daughter, still retaining in severalty their just shares and proportions of the whole estate, now seek to recover from the grantee of their mother not only two-thirds of this lot, set apart to her, but to obtain the same proportion of the valuable improvements placed upon it by defendant. Though claiming and enjoying under the judgment and decree of the Probate Court, large and valuable property, they repudiate the partition so far as the lot in controversy here is concerned, and insist that it is not only erroneous but absolutely null and void.

The objections made to the proceedings in the Probate Court are fully set out in the bill of exceptions contained in the record. (Tr., p. 44.) They will be examined in the order there presented.

POINTS AND AUTHORITIES.

1.

The Probate Courts of California in 1875 had jurisdiction, as ancillary to the settlement of the estates of deceased persons, to partition the real property among the heirs or other distributees.

The plaintiffs in error claim that the statutes giving this jurisdiction are unconstitutional.

The first Legislature of California, after the organization of the State, passed an act entitled "An Act to regulate the Settlement of the Estates of Deceased Persons," approved April 22d, 1850, (Stat. of Cal., pp. 377,) giving to the County Courts jurisdiction as Courts of Probate, of the estates of deceased persons, substantially as it has since been exercised by the Probate Courts of the State. Among the powers to be exercised were the distribution and partition of the property, on final settlement, to the heirs or other distributees.

On the 1st May, 1851, the act last referred to was revised, and another act entitled also "An Act to Regulate the Settlement of the Estates of Deceased Persons" was passed, which perfected and made more complete the Act of 1850, but retained most of its features and particularly those relating to the final settlement, distribution and partition, among the heirs or other distributees. (Stat. of Cal., 1851, pp. 448, 481, 482, 483.)

The probate jurisdiction was conferred on the County Court, the Statute last referred to providing as follows:

"§ 1. The County Court, when sitting for the transaction of probate business, shall be known and called the 'Probate Court,' and the County Judge shall be ex-officio Probate Judge."

(Id, p. 448.)

Though a series of amendments had been made from time to time down to the 11th March, 1872, of the various sections of the Act, so far as modes of procedure, etc., were concerned, the jurisdiction as to distribution and partition always remained the same.

On the 11th March, 1872, the Legislature passed "An Act to establish a Code of Civil Procedure" which went into effect on the 1st January, 1873, and has remained in force ever since, except as to formal amendments from time to time, not affecting the questions involved here. That Code covers not only the subject of procedure, in all the Courts of the State, but re-enacts the entire probate Act of 1851, referred to, on the whole subject of the settlement of the estates of deceased persons, and the powers and jurisdiction of the Probate Courts on the subject of distribution and partition of the property among the heirs or other distributees. It remains still in full force and ef-

fect. It will thus be seen that from the organization of the State to the present time, the legislative branch of the government has, persistently and continuously, manifested its intention to confer this jurisdiction upon the probate courts. The Courts have as persistently and continuously exercised this power, and there are now in the State millions of dollars worth of real property, the titles of the present possessors of which depend upon the power and jurisdiction of the Probate Courts of the State to make partition among the heirs or other distributees, as ancillary to the settlement of estates.

In some of the older States of the Union, such a state of facts in analogous cases has been treated as, in itself, sufficient to settle the question, and the error, if error it be, has been deemed too general, consequential and inveterate to be questioned, after thirty-eight years of universal practice. *Communis error facit jus.*

In *Kendall* vs. *Kingston*, 5 Mass., 533, Ch. J. Parsons, speaking for the Court, says:

"It is argued that the legislature cannot give a construction to the constitution, relative to private rights secured by it. It is true that the legislature, in consequence of their construction of the constitution, cannot make laws repugnant to it. But every department of government, invested with certain constitutional powers, must, in the first instance, but not ex-

clusively, be the judge of its powers, or it could not act. And certainly the construction of the constitution by the legislature ought to have great weight, and not be overruled, unless manifestly erroneous. In the present case, we think this construction is just and reasonable."

See also *Adams* vs. *Howe*, 14 Mass., 345.

In *Cobb* vs. *Kingman*, 15 Mass., 197, it was held:

"Where a part of a town had been annexed to, and made part of a parish in another town, without notice to such town, or the inhabitants of the part so annexed, and the same had been acquiesced in for nearly eighty years, it was holden to be too late for this Court to inquire into the constitutional authority of the legislature to make such annexation."

In the case of *Phipps* vs. *Ackers*, 9 Cl. & Fin., 598, Lord Brougham, in the House of Lords, said:

"It is of the most essential consequence that the doctrines which have been long received for law and acted upon by the Courts in their decisions, and by parties and their professional advisers in the disposition of property, should not be shaken. The Courts, and even this House, have frequently proceeded upon this principle, and have sanctioned what even plainly appeared to be erroneous principles, introduced and long assumed as law, rather than occasion the great inconvenience which must arise from correcting the common error, and recurring to more accurate views.

Accordingly, when *Cadell* v. *Palmer* was argued in this House, I advised that your Lordships should abide by the received extension which had for a great length of time been given to the period within which an executory devise might be held good, as not falling within the rule against perpetuities. In disposing of that case, however, my argument went expressly upon this view,—while I showed, I think, clearly, that the doctrine of twenty-one years and some months had originated in a manifest error originally arising from the period at which a recovery could be suffered to bar remainders. That argument I, however, perceive has not been reported."

But the acts of the Legislature referred to are not in violation of Article VI, Sec. 6, of the Constitution of California, as it existed in the year 1875 at the time of the proceedings involved here.

The contention of the counsel for the plaintiffs in error, is that all proceedings for the partition of lands are *exclusively of equitable cognizance*, and that the Section of the Constitution referred to, vested in the District Courts of the State original jurisdiction in all cases in equity, *to the exclusion of all other Courts.*

Art. VI, Sec. 6, of the Constitution of California in force in 1875, reads as follows:

"§ 6. The District Courts shall have original jurisdiction on all cases in equity; also, in all cases at law which involve the title or possession of real property,

or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand, exclusive of interest or the value of the property in controversy, amounts to three hundred dollars; and also in all criminal cases not otherwise provided for."

Power is also given to issue writs of habeas corpus.

On behalf of the defendant in error it is contended:

1st. That the partition of real estate is not a matter of *exclusive* jurisdiction in Courts of Chancery;

2d. That the jurisdiction granted the District Court in equity cases did not *exclude* or prohibit the Legislature from investing the Probate Courts with power and jurisdiction to partition the estates of deceased persons among the heirs or other distributees, as ancillary to the settlement and distribution of estates.

The First Proposition.

In England, the common law courts had jurisdiction to partition estates held by coparceners. Mr. Reeves in his History of the English Law as it existed in the latter part of the reign of Henry III, (A. D., 1272), says:

"When an inheritance descended to more than one heir, and they could come to no agreement among

themselves concerning the division of it, a proceeding might be instituted to compel a *partition*. A writ was for this purpose directed to four or five persons, who were appointed justices for the occasion, and were to *extend* and appreciate the lands by the oaths of good and lawful persons chosen by the parties, who were called *extensores;* and this extent was to be returned under their seals, before the king or his justices: when partition was made in the king's court, in pursuance of such extent, there issued a *seisinam habere facias*, for each of the *parceners* to have possession."

1 Reeves's Hist. 2d ed. (Dublin) 312; Finlason's ed. 335, citing Bracton, 71 *b* to 77 *b*; Dublin ed. of 1787, p. 312.

In Roscoe's Treatise on the Law of Actions (p. 130) it is said:

"A writ of partition lies *at common law* for one or more parceners against the other or others; and if one parcener, after issue had, dies, whereby her husband is tenant by curtesy, a writ of partition will lie against the husband. So if one parcener aliens in fee, the other may, *at common law*, have the writ against the alienee; and if there are three coparceners, and the eldest marries, and the husband purchases the interest of the youngest, though the husband be in respect of his own part a stranger, yet he and his wife may have a writ of partition *at common law* against the middle sister, for he is seized of one part in the right of his wife."

See also Co. Litt. 175 *a*, 167 *a*; Allnatt on Partition, 54, 55; Bac. Ab. Tit. Joint-Tenants (I);

Freeman on Cotenancy and Partition, §§ 420 *et seq.*

The right of partition at common law being limited to coparceners, created such great inconvenience as to call for the intervention of Parliament and by the Stat. 31 Hen. VIII., Cap. 1, (A. D. 1540) it was enacted:

"That all joint-tenants, and tenants in common, that now be, or hereafter shall be of any estate or estates of inheritance in their own right, or in right of their wives, * * * shall and may be coacted and compelled, by virtue of this present act, to make partition between them of all such manors, lands, tenements and hereditaments as they now hold or hereafter shall hold as joint-tenants or tenants in common, by writ *De participatione facienda* in that case to be devised in the King our sovereign Lord's Court of Chancery, in like manner and form as coparceners *by the common laws of this realm have been and are compelled to do, and the same writ to be pursued at the common law.*"

(See the Statute copied at length in note to Freeman on Cotenancy and Partition, Sec. 421.)

The statute last referred to being limited to estates *of inheritance*, the Stat. of 32 Hen. VIII, Cap. 32, A. D. 1541, was passed to cover cases of joint-tenants and tenants in common for life or years, etc.

Then followed the Stat. of 8 and 9 Wm. III, Cap. 31, A. D. 1697–8, which was practically a code of procedure, obviating the tediousness and

defective nature of former proceedings, and facilitating the partition; but it still was a common law proceeding. This statute, originally intended to continue in force for only seven years, was made perpetual by the statute 3 & 4 Anne, c. 18, § 2, A. D. 1705–6.

The modes of proceeding in partition cases in the common law Courts, are fully detailed by the following authorities :

Allnatt on Partition, 65, 70; Booth on Real Actions, 244–5; 2 Cruise, 385; Petersdorff's Ab. Tit. Partition; Littleton, Secs. 247, 248; Chitty's Pl., 1390 to 1407; Bac. Ab. Joint-Tenants (I) and Freeman on Cotenancy and Partition, Sec. 422.

The question of the origin and rise of Chancery jurisdiction over the partition of land, has created some interesting discussions participated in by Mr. Hargrave, Mr. Fonblanque, Mr. Story and others. Mr. Hargrave in his note to Co. Litt., 169 *a*, taking the common law side, speaks of the Courts of Chancery, "trenching upon the writ of partition, and wresting from a court of common law its ancient *exclusive* jurisdiction over this subject." Mr. Fonblanque as an advocate on the equity side, asserts the Chancery jurisdiction to be of very ancient date, but only claims for its Courts jurisdiction *concurrent* with the Common law Courts, and cites *Manaton* vs. *Squire*, 2 Free-

man, 26, and *Parker* vs. *Gerrard*, Ambl., 236, to that effect.

Mr. Story in 1 Eq. Juris., Sec. 646 *et seq.*, (10 ed., Redfield,) examines the subject and the views of Mr. Hargrave and Mr. Fonblanque, and asserts for the Chancery views of jurisdiction a very early origin, but he does not claim—in fact, none of the authorities claim—for the Courts of Chancery an *exclusive* jurisdiction in partition. On the contrary, he, like Mr. Fonblanque, only claims *concurrent* jurisdiction with the common law Courts. Mr. Story says (Id., Sec. 647):

"That the writ of partition is a very ancient course of proceeding at the common law is not doubted. But it by no means follows that the courts of common law had an exclusive jurisdiction over the subject of partition."

The views of Mr. Freeman (Cotenancy and Partition, Sec. 423, pp. 551, 552,) on the subject of the more modern rise of chancery jurisdiction, must attract great attention and respect. His researches were very thorough and his analysis complete. Speaking of a time when it may be assumed that there was no equitable cognizance taken of matters of partition, he says:

"But it is not safe to assume that some remedy always existed for every wrong and inconvenience. That joint-tenants and tenants in common must at a very early day have felt the necessity of relief in

equity by no means establishes that such relief was at once granted to them. In fact, we think the testimony borne by the statute of 31 Hen. VIII. is conclusive that Chancery had never at that time interposed in behalf of any cotenant by proceedings in partition, because the preamble of that statute, after reciting the numerous and grievous wrongs inflicted upon joint-tenants and tenants in common, asserts that '*they have been always without assured remedy for the same.*' "

In *Mundy* vs. *Mundy*, 2 Ves., Jr., 124, Lord Loughborough stated that there was no original jurisdiction in Chancery in partition and that it was a common law proceeding.

In *Calmady* vs. *Calmady*, 2 Ves., Jr., 570, the same learned jurist said:

"A party choosing to have a partition has the law open to him: there is no equity for it; but the jurisdiction of this Court obtained upon a principle of *convenience*. It is not for the Court to say, one party shall not hold his part of the estate as he pleases: but another person has also the same right to enjoy his part as he pleases, and therefore to have the estate divided. The law has provided, that one shall not defeat the rights of the other to the divided estate. Then the only question is, whether the legal mode of proceeding is so convenient as the means this Court affords to settle the interests between them with perfect fairness and equality. It is evident, the commission is much more convenient than the writ; the valuation of the proportions is much more considered; the interests of all the parties are much better attended to; and

it is a work carried on for the common benefit of both."

Everywhere the jurisdiction of the Courts of common law and chancery are considered as concurrent, but different writers and judges attribute different reasons for the exercise of chancery jurisdiction.

Mitford, Eq. Pl. by Jeremy, 120;
1 Story's Eq. Juris., Sec. 650, *et seq*;
Strickland vs. *Strickland*, 6 Beav., 77;
Agar vs. *Fairfax*, 17 Ves., 551;
Watson vs. *Duke of Northumberland*, 11 Ves., 155.

Mr. Story, after a careful review of the different grounds upon which jurisdiction in equity is claimed, says:

"It is upon some or all of these grounds, the necessity of a discovery of titles, the inadequacy of the remedy at law, the difficulty of making the appropriate and indespensable compensatory adjustments, the peculiar remedial process of courts of equity and their ability to clear away all intermediate obstructions against complete justice, *that these courts have assumed a general concurrent jurisdiction with courts of law in all cases of partition.* * * * In making partition, however, courts of equity generally follow the analogies of the law; and will decree it in such cases, as the courts of law recognize as fit for their interference."

1 Story's Eq. Juris., Sec. 658. (Redfield, 10th ed.)

See also *Wright* vs. *Marsh*, 2 G. Greene (Iowa), 105.

Mr. Freeman in his work on Cotenancy and Partition (Chapter XIX), presents a very complete history of the whole subject of partition and of the "origin and rise of chancery jurisdiction," maintaining with great ability the views ruled on here in support of the defendant in error, and sustaining the proposition "that the partition of real estate is not a matter of exclusive jurisdiction in Courts of Chancery."

The Second Proposition.

From the views already presented, it would seem that the second proposition must necessarily follow—"that the jurisdiction granted the District Court in equity cases did not *exclude* or prohibit the Legislature from investing the Probate Courts with power and jurisdiction to partition the estates of deceased persons among the heirs or other distributees, as ancillary to the settlement and distribution of estates."

Referring again to Art. VI, § 6, of the California Constitution, we find the jurisdiction of the District Courts presented. In early days, it was held that Art. VI, not only established "the several tribunals in which judicial powers were vested, but also distributed among those tribunals their several pow-

ers." That distribution was held to exclude the exercise of jurisdiction by one Court, of powers granted to another.

(See *Zander* vs. *Coe*, 5 Cal., 230, A. D., 1855.)

But subsequently the matter was again very fully considered, and *Zander* vs. *Coe* was overruled in *Courtwright* vs. *B. R. & A. W. & M. Co.*, 30 Cal., 577 *et seq.* The Court there reviewed the doctrine contended for by plaintiffs' counsel, and a series of cases in conflict with it, and in reference to the Constitution before the Amendments of 1862, said:

"It is necessary to proceed further to show that the cases are numerous which stand opposed to, or are inconsistent with, the idea of the complete distribution by the Constitution of judicial power among the several Courts, *and of their exclusive jurisdiction of all the subject matters committed to them.*" (p. 580.)

The Court further proceeded to say:

"It would be more difficult to sustain that position in respect to Article VI as amended in 1862. That it was intended that the jurisdiction conferred upon the several Courts of record should be exclusive as against Justices of the Peace, is apparent from the proviso in section nine, that the powers of Justices of the Peace, as fixed by the Legislature, 'shall not in any case trench upon the jurisdiction of the several Courts of record'; but it is worthy of notice that no analogous provision is made as between the several

Courts of record. There is in principle no more impropriety or greater inconsistency in granting to the several Courts organized under any government concurrent jurisdiction, to a greater or less extent, than there is in giving to the several Courts of the same order and grade the same authority over any given cause or subject matter of litigation. * * In *Delafield* v. *The State of Illinois*, 2 Hill, 164, Mr. Justice Bronson, in an opinion distinguished for its clearness and force, says: 'There is nothing in the nature of jurisdiction, as applied to Courts, which renders it exclusive. It is not like a grant of property, which cannot have several owners at the same time. It is a matter of common experience that two or more Courts may have concurrent powers over the same parties and the same subject matter. Jurisdiction is not a right or a privilege belonging to the Judge, but an authority or power to do justice in a given case when it is brought before him.'

The Courts that may exercise appellate powers and the subject matters entrusted to each are sufficiently indicated and defined, *but the lines dividing the original jurisdiction of the several tribunals are not accurately drawn.* And perhaps entire accuracy may not be attainable or desirable. Jurisdiction is not distributed uniformly on the basis either of the form of the action or of its subject matter, or of the value of the property or the amount of the demand in controversy, but each serves as a test as occasion may require. * * This want of a uniform test of jurisdiction would almost necessarily lead to a concurrent jurisdiction to some extent among the several Courts. Take the case

of an action in which the plaintiff has his election to proceed either at law or in equity, in which the property in controversy does not amount to three hundred dollars in value. If the plaintiff proceeds in equity the District Court has jurisdiction (*People* v. *Mier*, 24 Cal. 61; *Bell* v. *Crippen*, 28 Cal. 327); but if he elects to bring his action at law, it cannot be brought in that Court, but it may be commenced before a Justice of the Peace—these having been granted to Justices of the Peace by the Legislature, under the authority of the constitution, the requisite jurisdiction. * * * *There are many matters that we need not pause to specify that would usually and properly pertain to the Court exercising probate powers, as involved in the settlement of the estates of deceased persons, that may form the subject matters of suits in equity and be properly litigated in the District Court.*"

Since the decision of that case, the principles involved in it have been the settled law of the State.

See *Rosenberg* vs. *Frank*, 58 Cal., 402–3;
Caulfield vs. *Stevens*, 28 Cal., 118;
Yolo Co. vs. *City of Sacramento*, 36 Cal., 195;
Stoppelkamp vs. *Mangeot*, 42 Id., 324, 325.

The Probate Court.

The Probate Courts were created by the Constitution as well as the District Courts. Art. VI, § 1, declares:

"The judicial power of this State shall be vested in a Supreme Court, in District Courts, in County Courts, in Probate Courts, and in Justices of the Peace, and in such Recorders' and other inferior Courts as the Legislature may establish in any incorporated city or town."

Sec. 8 of Article VI. of the Constitution as adopted in 1850, was as follows:

"There shall be elected in each of the organized counties of this State, one County Judge, who shall hold his office for four years. He shall hold the County Court, and perform the duties of Surrogate, or Probate Judge."

He was also vested with jurisdiction in certain criminal matters.

In 1862, several Sections of Art. VI of the Constitution were amended and the numbering changed, so that Sec. 7 superseded Sec. 8 above given. Sec. 7 as amended, reads as follows:

"There shall be in each of the organized counties of the State a County Court, for each of which a County Judge shall be elected by the qualified electors of the county. * * In the City and County of San Francisco the Legislature may separate the office of Probate Judge from that of County Judge, and may provide for the election of a Probate Judge, who shall hold his office for four years."

This was always thereafter done until 1880, when the New Constitution went into effect.

Sec. 8 of Art. VI as amended in 1862, among other things, provided as follows:

"The County Judges shall also hold, in their several counties, Probate Court, *and perform such duties as Probate Judges as may be prescribed by law.*"

Of course, the separate Probate Judge of San Francisco was on the same plane of jurisdiction as the County Judges when acting as Probate Judges, and the legislation pursuant to the Constitution was equally applicable to all counties.

Under these several Sections of the original Constitution and the Constitution as amended, as well as under the New Constitution of 1879, the general probate law as passed by the legislature, has remained the same and particularly that part relating to the distribution of estates and partition among the heirs or other distributees.

The general principle of the construction of State Constitutions adopted elsewhere, prevails in California. Probably it is nowhere more plainly expressed than in *Bourland* vs. *Hildreth*, 26 Cal., 162. The syllabus is as follows:

"The Constitution of the State is not a grant of power, nor an enabling Act to the Legislature. It is a limitation on the general powers of a legislative character, and restrains the legislative department only so far as the restriction appears either by express terms or by necessary implication."

"An Act of the State Legislature should not be declared unconstitutional and void by the Courts unless there is a clear repugnance between the Act and the Constitution; and where there is a reasonable doubt whether the Act is repugnant to the Constitution, the Court should pronounce in favor of its constitutionality."

This is cited merely to show that California remains orthodox on these elementary principles.

Although the language of the Constitution of California is quite general and it may be vague as to the jurisdiction of the Probate Courts, it has been held in a series of cases that the jurisdiction over the estates of deceased persons is quite plenary.

In *Auguisola* vs. *Arnaz*, 51 Cal., 438, the Court said:

"It may be conceded that the District Courts have jurisdiction of actions against executors and administrations to declare and enforce trusts, in respect to real estate in many cases, and that actions may be brought in those Courts, in respect to certain controversies having their origin in the administration of the estates of deceased persons (see *Haverstick* v. *Treadwell*, ante, p. 431); *but Probate Courts have the exclusive jurisdiction of the accounts of executors and administrators, and of the final distribution of the estates of decedents.* (*In the Matter of the Will of Bowen*, 34 Cal. 682; *Gurnee* v. *Maloney*, 38 Cal. 85; *Bush* v. *Lindsey*, 44 Cal. 121.)"

See also *Gurnee* v. *Maloney*, 38 Cal., 87.

In *Rosenberg* vs. *Frank*, 58 Cal., 402, the Court says:

"The jurisdiction of the Probate Courts is not defined in the Constitution. In the eighth section of article vi, Constitution of 1849, it is provided that 'the County Judges shall also hold in their several counties Probate Courts, and perform such duties as Probate Judges as may be prescribed by law.' In the seventh section of the same article it is provided: 'In the City and County of San Francisco, the Legislature may separate the office of Probate Judge from that of County Judge, and may provide for the election of a Probate Judge who shall hold his office for the term of four years.'

It seems from the above that the Legislature may make the jurisdiction of the Probate Judge or Court what it pleases, within the limits of that jurisdiction, which is understood as usually pertaining to Probate Courts."

By the decision of the Supreme Court of California, the Probate Courts have been held to be vested with powers and jurisdiction of an equitable character. As early as the January term, 1855, speaking of the powers of a Probate Court, the Court in *Clarke* vs. *Perry*, 5 Cal., 60, says:

"Most of its general powers belong peculiarly and originally to the Court of Chancery, which still retains all of its jurisdiction."

That case was cited with approval by the Court in *Belloc* vs. *Rogers*, 9 Cal., 129; *Deck* vs. *Gerke*, 12 Id., 436; *Walls* vs. *Walker*, 37 Cal., 426; *Rosenberg* vs. *Frank*, 58 Cal., 400.

In *Estate of Hinckley*, 58 Cal., 457, 505, the Probate Court was held to have power "incidentally to its general jurisdiction, to settle the estates of deceased persons, to recognize, as entitled to a distributive share of an estate, the trustees named in * * valid devises and bequests." In doing so the Probate Court was called upon to pass upon very complicated and difficult questions of general equitable cognizance, as will be seen from the elaborate and able opinion of Mr. Justice McKinstry in that case.

In the case entitled "*In the matter of the Estate of Felicidad Carillo de Castro, deceased*, vs. *John Barry*," 18 Cal., 96, the grantees of heirs petitioned the Probate Court for *partition* of the estate. There were infants interested, and their counsel made the point that the Probate Court had no jurisdiction of the proceeding. (p. 98.) The Supreme Court, citing Section 264 of the Probate Act of 1851, above referred to, subsequently carried into the Code of Civil Procedure and numbered Section 1678, says the Act should receive a liberal construction, and holds that the Probate Court had jurisdiction. This case never has been questioned, criticized or reversed.

In *Cota* vs. *Jones*, 8 Pac. Co. L. J., 1044, 1046, the power and jurisdiction of the Probate Court to make partition, is distinctly recognized and acted on.

As late as July, 1886, partition proceedings in the Probate Court were not only sustained by the Supreme Court of California, but parties were held estopped by virtue of such partition from setting up an adverse title to their co-tenants under the same title. *Burroughs* vs. *De Couts*, 70 Cal., 371.

The Court there decided:

"Both Burroughs and Seamans are *estopped by the decree of partition in probate* from setting up title derived from Soto adverse to that of their co-tenants under the same title." (Code Civ. Proc., Sec. 1908; Freeman on Cotenancy and Partition, Secs. 530–532; Freeman on Judgments, Sec. 249.)

"Proceedings of the courts of probate within the jurisdiction conferred upon them by the law are to be construed in the same manner and with like intendments as the proceedings of Courts of general jurisdiction, and their judgments and decrees have like force and effect as judgments of the District Courts. (Hittell's General Laws, Art. 1229.)"

This power and jurisdiction of the Probate Courts to make partition, as ancillary to the settlement and distribution of estates, prevails in many states of the Union. The views of Mr. Freeman in his work on Cotenancy and Partition, Sec. 550, are so clear and apposite that a somewhat lengthy extract may be pardoned. He says:

"All the property in every State or nation whose laws recognize the rights of the heirs, devisees, or legatees of a deceased person, must in each succeed-

ing generation pass into the control of tribunals vested with jurisdiction over the estates of decedents, and must by those tribunals be distributed in the majority of cases, in undivided moieties. Tenancies in common or in coparcenary are thus created, the desire of whose owners for partition thereof into estates in severalty is generally more immediate and pressing than if their co-ownership had resulted from a joint purchase. By the proceedings to settle the estate of the decedent all parties in interest are brought before the Court, and their respective shares definitely and conclusively ascertained and established, and thereby are attained some of the ends usually sought by a suit for partition. The convenience of proceeding from this point without turning the parties over to some other tribunal is so obvious, that in many of the States the Court having jurisdiction over the estate of decedents is authorized to make complete partition thereof among the heirs, devisees, or other beneficiaries. The jurisdiction thus established is scarcely second to any in importance; and we, therefore, exceedingly regret that the Statutes regulating its exercise are so general in their terms, and the decisions interpreting them are so infrequent, that the practitioner must proceed almost without a guide, unless we regard him as at liberty to pursue the general rules applicable to proceedings for partition conducted in other Courts. With respect to the time when application may be made for the partition of the estate of a decedent, it is obvious that it cannot precede the valid appointment of an administrator or executor, because it is merely ancillary to the administration; and, therefore, if the supposed

grant of administration is declared void, the proceedings for partition cannot be rescued from the same fate."

See also *Id.*, Secs. 551 to 564.

The same author to show how wide-spread this jurisdiction prevails, refers to the statutes and codes of the following states: Alabama, California, Connecticut, Georgia, Maine, Maryland, Massachusetts, Minnesota, Michigan, Rhode Island, Vermont, Texas, Indiana and New Hampshire.

(Id., Sec. 429 & note; Sec. 550 and note.)

He might also have added, Pennsylvania, Nebraska, Louisiana, Mississippi, New Jersey, Tennessee & Wisconsin.

In 1 Washburn on Real Property, p. 586, (3d ed.) after treating of partition generally, the author says:

"In most of the States, in addition to the modes of effecting partition above mentioned, courts of probate jurisdiction have the power to cause partition to be made among the heirs or devisees of an estate which has come within the cognizance of the Court."

He adds in a note (p. 591):

"In a large majority of the States, partition may be made by a summary and convenient method of petition to *the courts of common law.*"

In *Sigourney* vs. *Sibley*, 38 Mass., 101, referring to this jurisdiction of the Court of Probate to make partition, Chief Justice Shaw says:

"*It is incident to the general Probate jurisdiction of the estate of a deceased person. It is fit it should be so.* It is most competent for that Court to judge whether real estate may be required as assets, and therefore to determine the expediency of making partition among heirs and devisees who, in regard to creditors, are to be deemed volunteers. There can be but one Court of Probate in the State which has rightful jurisdiction of the settlement of an estate, and that must be the Court having jurisdiction to make partition."

That the jurisdiction of Probate Courts, by whatever name called, is widely exercised in the States of the Union and has been found to be a very useful jurisdiction, will be seen from the following cases:

Bryant vs. *Stearns*, 16 Ala., N. S., 302;
Coke vs. *Pitts*, 37 Ala., N. S., 693;
Gates vs. *Treat*, 17 Conn. R., 389;
Schull vs. *Kennon*, 12 Ind. R., 35;
Bennet vs. *East*, 7 Ind. R., 175;
Mason vs. *Mason*, 12 La. (old series), 742;
Badon vs. *Foucher*, 15 Id., 290;
Hooke vs. *Hooke*, 6 Id., 569;
Pottter vs. *Webb*, 2 Me. R., 236;
Earl vs. *Rowe*, 35 Id., 415;
Cogswell vs. *Reed*, 12 Id., 198;
Dean vs. *Hooker*, 31 Id., 107;
Furlong et al. vs. *Soule*, 39 Id., 123;
Pierce vs. *Irish*, 31 Id., 254;
Clark vs. *Pishon*, 31 Id., 503;

Potter vs. *Hazard*, 93 Mass., 187;
Wainwright vs. *Door*, 30 Id., 333;
Arms vs. *Lyman*, 22 Id., 211;
Sigourney vs. *Sibley*, 38 Id., 101;
Bemis vs. *Stearns et al.*, 16 Id., 200;
Jenks vs. *Howland*, 69 Id., 536;
Gordon vs. *Pierson*, 1 Id., 323;
Gains vs. *Smiley*, 7 Smedes & Mar., 53;
Campbell vs. *Wallace*, 12 N. H., 263;
Kelley vs. *Kelley*, 41 N. H., 501;
Den Ex. Dem. Richman vs. *Baldwin*, 1 Zabr. R., N. J., 395;
Curtis vs. *Jenkins*, 1 Spencer, N. J., 679;
State vs. *Meyhew*, 4 Halstead, N. J., 70;
Mehaffy vs. *Dobbs*, 9 Watts, Penn., 363;
Bishop's Appeal, 7 Watts & S., 251;
Hise vs. *Geiger*, 7 Id., 273;
Groff vs. *Groff*, 14 Sergeant & R., 183;
Selfridge's Appeal, 9 Watts & S., 55;
McPherson vs. *Cunliff*, 11 Sergeant & R., 422;
Bavington vs. *Clark*, 2 Penn., 115;
Gardner's Estate, Waln's Appeal, 4 Penn. St., 502;
Herr vs. *Herr*, 5 Id., 428;
Eell's Estate, 6 Id., 457;
Painter vs. *Henderson*, 7 Id., 48;
Lair vs. *Hunsicker*, 28 Id., 115;
Ihmsen vs. *Ormsby*, 32 Id., 198;

Merklein vs. *Trapnell*, 34 Id., 42;
Snyder's Appeal, 36 Id., 166;
Dresher vs. *the Allentown Water Co.*, 52 Id., 225;
Harlam vs. *Langham*, 69 Id., 235;
McClure vs. *McClure*, 2 Harris, Penn St., 134;
Wilcox vs. *Common*, 1 Coldwell R., Tenn., 370;
Grice vs. *Randall*, 23 Vt R., 242;
Gillett vs. *Treganza*, 13 Wis., 472;
Tryon vs. *Farnsworth*, 30 Id., 577;
Simpson vs. *Cook*, 24 Minn., 180;
Tompkins vs. *Tompkins*, 1 Story, Cir. Ct. R., 547;
Shaw vs. *Shaw*, 4 Cranch, Cir. Ct. R., 715;
Lewis vs. *Pratt*, 2 Whar. (Penn.), 81;
Hubbard vs. *Ricart*, 3 Vt. R., 207;
Vick vs. *Vicksburg*, 1 How. (Miss.), 444.

In Bispham's Principles of Equity, 2d ed., p. 533, Sec. 488, it is said:

"In nearly all of the United States the partition of real property is the subject of express statutory enactments. In some States the remedy is by petition, the common law writ, in many of them, existing concurrently. In others, the common law action has been freed from its disadvantages, and rendered more effective and available. Partition of decedents' estates is also effected in some States by probate courts and similar tribunals.

In many of the States, however, the remedy by bill in equity also prevails, and from its many advantages must continue to be a favorite method of effecting a division of real property between joint-owners."

The jurisdiction of Probate Courts over the estates of deceased persons is so comprehensive, that in many States those courts have the power to decree to a limited extent the specific performance of contracts. In California, such has been the law from the organization of the State. Sec. 1597 of the Code of Civil Procedure is as follows:

"§ 1597. When a person who is bound by contract in writing to convey any real estate dies before making the conveyance, and in all cases when such decedent, if living, might be compelled to make such conveyance, the court may make a decree authorizing and directing his executor or administrator to convey such real estate to the person entitled thereto."

This jurisdiction has been sustained by the Supreme Court of the State.

See *Estate of Corwin*, 61 Cal., 163; *Cory* vs. *Hyde*, 49 Id., 369.

The same is true of other States.

See *Chess's Appeal*, 4 Penn. St., p. 52.

It will thus be seen that the State of California, in conferring the power upon her Probate Courts to partition estates upon final distribution among the heirs or other distributees, has only advanced in progress to the position in that regard set by the

honorable example of such States as Massachusetts, Connecticut, Pennsylvania and the others above named. Such partition has become a usual and customary act of administration, and is looked upon as rightfully attaching to Probate Courts, and as a power ancillary to the due settlement and distribution of estates. We further see that the jurisdiction in other Courts to partition real estate among joint tenants, tenants in common and coparceners, is a concurrent one between Courts of Chancery and Courts of common law; and it is confidently submitted, that the statutes of California investing her Probate Courts with jurisdiction to partition estates among the heirs or other distributees, is not in violation of the Constitution of the State and is not prohibited in any clause or section of the same.

Such jurisdiction seems to be peculiarly adapted to a State like California where the entire property of the decedent, both real and personal, passes to the possession and control of the executor or administrator until final distribution, and where almost all actions, relating to the estate and property, must be brought by or against the executor or administrator, and where judgments against the administrator bind the heir, and where it has been held that the heir is barred by the statute of limitations when the administrator is barred.

See *Meeks* vs. *Olpherts*, 100 U. S. R., 564;

Meeks vs. *Vassault*, 3 Sawyer, 206, and cases cited;
Cunningham vs. *Ashley*, 45 Cal., 485;
Meeks vs. *Hahn*, 20 Cal., 621;
Meeks vs. *Kirby*, 47 Cal., 168;
Chapman vs. *Hollister*, 42 Cal., 462;
Burton vs. *Lies*, 21 Cal., 91.

But another view is equally conclusive of the right of the legislature to vest the Probate Courts with this jurisdiction. The whole subject of descents and distribution of property, upon the death of a citizen, is within legislative control. Nothing in the Constitution contains any limitation on this power. In early California days, it was much discussed as to whether the civil or common law should be adopted. Finally the advocates of the common law prevailed in the main, but still we have no dower, no tenancy by the curtesy, but the system of common and separate property between husband and wife.

For years the statutes of California declared that all property acquired by either husband or wife, other than by descent, gift or devise, was the common property of husband and wife—on the death of either to go one half to the survivor and one half to the children of the decedent. In such case, if a man lost his wife, though he were still in the prime of life and in the midst of a large business, commercial or otherwise, he lost half of

his property also, or in other words, half went to the children of his deceased wife. This was subsequently changed, and for a number of years past it has been the law that on the death of the husband, the community property passes one half to the surviving wife and the other half to the children, but in case the wife dies first, the whole community property vests in the husband without administration. Now the heir takes just such share or part of his ancestor's estate as the law gives him, and moreover must take it in the mode and at the time and on the conditions prescribed by law. As a part of the law of descents and successions, it is entirely competent for the legislature to say to the heir: "You shall take your share of the estate of your ancestor in severalty, if your co-heir requires it."

And the Legislature may well say to the co-heir: "You may have your share of the estate in severalty at your election, to be exercised in the Probate Court, pending the administration." It would be strange if there should be found in the Constitution a restriction on the power of the Legislature to so prescribe. This is in effect the result and operation of our probate system. It gives the heir or devisee his share in severalty, if he desire it, and shall express in a required mode his election to so claim it, and it empowers the Court having control of the estate to so distribute the

property that each shall take in severalty his just share and proportion.

The power of the Legislature over the subject of descents and successions is quite absolute, there being but little limitation upon it in the Constitution.

See *State* vs. *Smith*, 70 Cal., 155;
Lyons vs. *State*, 67 Cal., 380;
Carrasco vs. *State*, Id., 385;
People vs. *Rogers*, 13 Id., 165.

The power of the Legislature is as plenary in California as in most of the States, and the general principles relating to it are as broadly announced by its Courts. In *People* vs. *Coleman*, 4 Cal., 49, it is said :

"1st. That each State is supreme within its own sphere, as an independent sovereignty.

2nd. That the Constitution of this State is not to be considered as a grant of power, but rather as a restriction upon the powers of the Legislature; and that it is competent for the Legislature to exercise all powers not forbidden by the Constitution of the State, or delegated to the General Government, or prohibited by the Constitution of the United States."

II.

The jurisdiction of the Probate Court of California was not limited to the allotment to each heir or devisee in severalty, of his portion or interest in each parcel of land.

The plaintiffs in error assert the contrary. (Tr., 44, Bill of Ex.)

In 1 Story's Eq. Juris., Sec. 657, (Redf. 10 ed.) it is said:

"In equity, too (and it would seem that the same rule prevails at law, though this has sometimes been doubted), where there are divers parcels of lands, messuages, and houses, partition need not be made of each estate separately, so as to give to each party his moiety or other portion in every estate. But the whole of one estate may be allotted to one, and the whole of another estate to the other, provided that his equal share is allotted to each. But it is obvious, that, at law, such a partition can rarely be conveniently made, because the court cannot decree compensation, so as to make up for any inequality, which must ordinarily occur in the allotment of different estates to each party. In equity it is in the ordinary course."

The general power and jurisdiction to partition the estate among the heirs, carries with it the power to exercise all the incidental powers usual in making partitions. In New Hampshire, it was so held in *Cheswell* vs. *Chapman*, 38 N. H., 17. There it was held that the right of way might be given over one of the tracts allotted in severalty. The Court said:

"The authority to give such rights and privileges is believed to have been long and generally exercised by courts of probate in this State; and we think the authority is necessarily implied in the grant of jurisdic-

tion to make partition and division of estates; because, in numerous cases, a judicious and convenient partition could not be made without it. In other jurisdictions the power to create such rights and privileges, on partition, by legal proceedings, has often been recognized. We are, therefore, of opinion that the Probate Court, upon division of deceased person's estate, may, in a case where necessity or convenience requires it, give one share a right of way over land assigned to the other shares."

There can be no reasonable doubt of the power of the Legislature to give the Probate Court jurisdiction to partition the estate in such manner as to be fair and just to all, and as a mere mode of accomplishing that, to act upon the principles which prevail in Courts of equity in like cases. The Code of Civil Procedure of California vests the Probate Court with all such powers. It expressly provides for assigning the whole to one heir, in case the property cannot be divided without prejudice or inconvenience to the owners, upon his paying to the other parties interested their just proportions of the true value, etc. Various sections confer upon the Court powers as ample as those exercised by Courts of equity in like cases.

Co. of Civ. Pro., Secs. 1680 to 1686, inclusive.

For convenience an appendix is hereto annexed which contains all of the Sections of the Code of

Civil Procedure in force in 1875, which have a bearing upon the subject, to which attention is respectfully invited.

Mr. Freeman in his work on Cotenancy and Partition, Sec. 559, referring to these sections of the Code, says:

"§ 559. The duties and powers of the commissioners are probably co-extensive with those of commissioners in an ordinary suit for partition. They 'may take testimony, order surveys, and take such other steps as may be necessary to enable them to form a judgment upon the matters before them.' We find no decision or statute directly adopting for the guidance of the commissioners or of the Court the principles regulating partition in other proceedings, yet we apprehend that these principles are necessarily involved in the grant of power to make partition. The partition authorized is evidently one conducted according to the equitable rules long recognized in like proceedings in other Courts. Thus, some of the heirs might have conveyed portions of the common property, or enhanced their value by permanent and costly improvements. If partition were enforced at law or in equity, it would be the duty of the commissioners and of the Court, so far as might be done without prejudice to the interests of the other heirs, to set apart to the heir thus conveying or improving some part of the common property, the part so conveyed or improved. We think the same duty arises under like circumstances, when the partition is merely ancillary to the settlement and distribution of the estate of a deceased person. To hold otherwise would be to make the proceeding

grossly inequitable, and render the rights of the parties dependent upon the Court which happened to have jurisdiction rather than upon the established principles of jurisprudence."

Sec. 1686, C. C. P. Cal., expressly authorizes the Probate Court to hear and determine all questions of *advancement* and to take the same into account in making partition, and the like power exists in other States.

Code of Georgia, Secs. 2579-2583; *Sims* vs. *Sims*, 39 Ga., 108; Howells St., Mich. Sec. 5978; St. Conn., Ed. 1875, p. 372, Sec. 6; Rev. St. Wis., Sec. 3958, cited in note in Freeman on Cotenancy and Partition, latter part Sec. 559, p. 737.

The power, therefore, of the Probate Court, in making the partition, to allot the land in distinct parcels to each heir and to equalize any difference in value would seem to rest upon the most substantial basis. The statute of the State, referred to, is but an adoption of the general principles appertaining to the partition of lands as followed in other Courts.

The foregoing views as to the second proposition were written before the brief of plaintiffs in error was served, and were intended to meet the point made in the bill of exceptions. Upon an examination however of the assignment of errors in the brief of counsel for plaintiffs in error, it will be seen that *the second proposition in the bill of exceptions has been abandoned.*

III.

The second assignment of error is that "the petition was not filed by a person interested in the estate, but by the administratrix of the estate, who has no interest."

(Brief of plaintiffs in error, p. 3.)

The point made on this assignment is further stated as follows (Id., p. 19):

"Administratrix, as such, not interested in the Estate in a partition, and cannot initiate proceedings therefor."

This objection is based upon the idea that the petition of Mrs. Caroline Hawes, found in the record and called Exhibit A. (Tr., pp. 14 *et seq.*) is to be treated as the petition of the administratrix alone, though she sets forth in the petition the fact that she is the widow and one of the heirs of the decedent. It is manifest that though she was administratrix and affixed a *descriptio personæ* to the subscription of her name to her petition, she was nevertheless directly interested in the estate. The petition addressed to the Probate Court says:

"Your petitioner, Caroline Hawes, respectfully represents that she is the widow of Horace Hawes deceased and that Horace Hawes aged 16 years and Caroline C. Hawes aged 10 years, and your petitioner are the only heirs at law of said decedent."

The petition then proceeds to set forth all the requisite facts to obtain a final settlement, distribution and partition.

Was not then the petition by one interested? When she added to her name the words, "administratrix of the estate of Horace Hawes, deceased," did she thereby cease to be interested in the estate? Did that *descriptio personæ*, nullify the allegations of the petition, showing her interest as widow and heir? The case entitled "*In the estate of Philip G. Marrey*, deceased, *Roderigo Wilkinson, appellant*, 65 Cal., 287, does not sustain this point of plaintiffs in error.

The language of a decision must of course "be construed with reference to the reason and facts of the cases," according to the maxim of Chief Justice Marshall in *Cohens* v. *Virginia*, 6 *Wheat.*, 399.

Uhlfelder v. *Levy*, 9 Cal., 615.

In the case in 65 Cal., 287, the executor took an appeal *as executor*, and in such a manner as to charge the estate with the expenses of the litigation if he were maintained. The question involved did not affect the estate but only the legatees. The Court held:

"He cannot in any case litigate the claim of one legatee as against the others at the expense of the estate. (*Bates* v. *Ryberg*, 40 Cal. 463.) *A fortiori* when he himself is the legatee whose claim he is attempting to maintain, at the expense of the estate, in his capacity of executor."

In the case cited *Bates* v. *Ryberg*, the executor had no interest either as heir, legatee, or distributee.

The case of *Cox* vs. *Ingleston*, 30 Vt., 258, will be found equally inapplicable.

Under the California Code, however, the administratrix as such had the power to make the application for final settlement, distribution and partition, in the form adopted in this case, a proposition we present under the next head.

IV.

The Third, Fourth and Fifth errors assigned. (*p. 4 Plaintiffs' brief.*)

These errors present questions so intermingled as to require a general treatment together, or more strictly speaking, an examination of one necessarily involves the consideration of the others. They necessarily assume the constitutionality of the Acts of the legislature under review but it is insisted that there were such irregularities in the probate proceedings as to render the whole absolutely null and void.

The learned counsel for Plaintiffs in error does not present in his brief all of the Sections of the Code of Civil Procedure necessary to a thorough and accurate view of the whole subject. The omission is here supplied in the appendix to this brief.

An examination of these various Sections will show that provisions are made for *annual* ac-

counts of the administrator and for *final* accounts; also that certain things may be done *at the time* of the settlement of the final account and certain things *after* final settlement.

Appendix hereto—Secs. 1628, 1634, 1652, 1665, 1667.

Sec. 1633 is as follows:

"When *any account* is rendered for settlement, the court or judge must appoint a day for the settlement thereof; the Clerk must thereupon give notice thereof, by causing notices to be posted in at least three public places in the county, setting forth the name of the estate, the executor or administrator, and the day appointed for the settlement of the account, which must be on some day of a term of the court. The court or probate judge may order such further notice to be given as may be proper."

Section 1634, as amended in 1873--4, is as follows:

"If the account mentioned in the preceding section be for *a final settlement, and the estate be ready for distribution, the notice of the settlement must state those facts, and must be served, published, or waived in the same manner as provided in Section* 1539 *of this Code relating to sales of property;* and, on confirmation of the final account, *distribution and partition of the estate to all entitled thereto, may be immediately had, without further notice or proceedings.* If, from any cause, the hearing of the account or the partition and distribution be postponed, the order postponing the same to a day certain is notice to all persons interested therein."

Referring to Section 1539, as amended in 1873–4, we find it to be as follows:

"A copy of the order to show cause must be personally served on all persons interested in the estate, any general guardian of a minor so interested, and any legatee, or devisee, or heir of the decedent, provided they are residents of the county at least ten days before the time appointed for hearing the petition, *or be published four successive weeks in such newspaper in the county as the Court or Judge shall direct.* If all persons interested in the estate join in the petition for the sale, or signify in writing their assent thereto, the notice may be dispensed with, and the hearing may be had at any time."

This section is substantially as the law stood at the time of the adoption of the Code. The old probate act had been amended in 1861, and Sec. 157 read as follows:

"A copy of such order to show cause shall be personally served on all persons interested in the estate, at least ten days before the time appointed for hearing the petition, *or shall be published at least four successive weeks in some newspaper as the Court or Judge shall order; provided*, however, if all persons interested in the estate shall signify in writing their assent to such sale the notice may be dispensed with." (Stat. Cal. 1861, p. 641.)

This section has been construed by the Supreme Court of California in *Pearson* vs. *Pearson*, 46 Cal., 635. The Court says:

"Section one hundred and fifty-seven of the Probate Act requires that the order to show cause 'shall be personally served on all persons interested in the estate, at least ten days before the time appointed for hearing the petition, or shall be published at least four successive weeks in some newspaper, as the Court or Judge shall order; provided, however, that if all persons interested in the estate shall signify, in writing, their assent to such sale, the notice may be dispensed with.' By section two hundred and sixty, the foregoing provision is made applicable to proceedings for distribution. There were, then, three methods by which jurisdiction might be acquired: first, by a personal service on *all* persons interested in the estate; second, by publication for four successive weeks; third, by the assent, in writing, to the distribution, by all persons interested in the estate."

Turning to the record in this case (Tr., pp. 14, *et seq.*) it will be found that these sections of the Code were exactly complied with. The administratrix had filed her account for final settlement, accompanied with her petition representing the estate to be ready for distribution, and it was, as appears by the record, in fact, ready for distribution. (Tr., p. 8, Finding VII.)

Upon this the Probate Judge made the order to show cause found in the record (Ex. B., Tr. p. 18), which is very full and the order concluded as follows:

"And it is further ordered, that notice of the foregoing be given by publication, and that a copy

hereof be published once a week for four successive weeks, before said 23d day of March, A. D. 1875, in the Daily Examiner, a daily newspaper printed and published in said city and county."

Section 1705 of the Code of Civil Procedure is as follows:

"When any publication is ordered, such publication must be made daily or otherwise, as often during the prescribed period as the paper is regularly issued, unless otherwise provided in this title. *The Court or judge may, however, order a less number of publications during the period.*"

This ends the questions as to the order and its validity.

The Circuit Court found:

"Pursuant to said order of said Probate Court, of the 18th day of February, 1875, being 'Exhibit B' hereto annexed, the same was published once a week for four successive weeks, before said 23d day of March, 1875, that is to say: on the 18th and 25th days of February, and upon the 4th, 11th and 18th days of March, respectively, 1875, in said *Daily Examiner*, a daily newspaper, printed and published in said City and County." (Tr., pp. 8 and 9, Finding IX.)

These publications were upon *five* successive Thursdays, the first being on the day the order was made.

The learned counsel for the plaintiffs in error attempts to discuss the sufficiency of the evidence

to sustain this finding. That he can not do so is too well settled for discussion.

On the 23d March, 1875, the day appointed for the hearing, the Court ordered a postponement until the 29th March, 1875. (Tr., p. 9, Finding X.)

The latter part of Sec. 1634 above quoted, applies here :

"If, from any cause, the hearing of the account or the partition and distribution is postponed, the order postponing the same to a day certain is notice to all persons interested therein."

On the 29th March, 1875, the matter came on regularly for hearing. The first requisite was the proof of notice in accordance with Section 1638, and the determination by the Court of the fact of the notice given.

Sec. 1638 provides:

"The account must not be allowed by the court until it is first proved that notice has been given as required by *this Chapter*, and the decree must show that such proof was made to the satisfaction of the court, *and is conclusive evidence of the fact.*"

The Chapter referred to embraces Sections 1633 to 1638, inclusive.

The decree does show that such proof was made to the satisfaction of the Court.

Whether as declared, such recital would cut off all inquirry into the fact, and whether the decree

is conclusive evidence of this jurisdictional fact, are questions which do not arise here, for *no attempt was made by plaintiffs in error to impeach the decree, or to offer any evidence that no such notice was given.*

In *McClellan* vs. *Downey*, 63 Cal., 523, the Supreme Court comments on the above section and recital, in a case where an attempt was made in a collateral action to prove that no such notice was given as the recital set forth. The Court said:

"It did not, then, rest with the trial court in this action to hear evidence that the Probate Court had not due and legal proof that proper notice had been given, or to find contrary to its recital. The decree of the Probate Court on this point was full and ample, as required by the statute, as well as to the settlement of the account as to the distribution, and is conclusive."

See, also, to same point: *Estate of Sbarboro*, 70 Cal., 147; *Estate of Pulomares*, 63 Id., 404; *Dean* vs. *Superior Court of Santa Clara Co.*, Id., 477; *Wiggin* vs. *Superior Court*, 68 Id., 400.

In the latter case the Court lays down the law as now established in California, as follows:

"In a direct appeal from a judgment or order the recitals therein are not conclusive, and may be contradicted by other portions of the record. (*McKinlay* v. *Tuttle*, 42 Cal. 571.) But in a collateral attack on a judgment of a court of superior jurisdiction the recitals are presumed to be correct, and every intendment will

be indulged in its support. (*Drake* v. *Duvenick*, 45 Cal. 455; *Hahn* v. *Kelly*, 34 Cal. 391.)"

It must be remembered also that since 1858, the Probate Courts of California have been elevated to the rank of Courts of general jurisdiction, and all their proceedings are to "be construed in the same manner, and with like intendments, as the proceedings of courts of general jurisdiction; and that the records, orders, judgments, and decrees, of the said probate courts, shall have accorded to them like force and effect, and legal presumptions, as the records, orders, judgments, and decrees of the district courts."

Hittell's General Laws, Art. 1229—same as Stat. of Cal., 1858, p. 95.

In *Burroughs* vs. *De Couts*, 70 Cal., 372, the Supreme Court said:

"Proceedings of the courts of probate within the jurisdiction conferred upon them by the law are to be construed in the same manner and with the like intendments as the proceedings of courts of general jurisdiction, and their judgments and decrees have like force and effect as judgments of the District Courts. (Hittell's General Laws, art. 1229.)"

See also *Brodribb* vs. *Tibbits*, 63 Cal., 80; *Rogers* vs. *King*, 22 Id., 72; *McCrea* vs. *Haraszthy*, 51 Cal., 148; *Reily* vs. *Lancaster*, 39 Id., 356; *Litel* vs. *Foote*, Id., 440; *Hahn* vs. *Kelly*, 34 Cal., 391.

From the above it appears that the Probate Court had jurisdiction of the subject matter of the settlement of the final account of the administratrix and of the distribution and partition of the estate. The notice required by law to be given to all persons interested, was duly given. The Court thereupon had complete jurisdiction over the whole subject of the settlement of the account, of the distribution and of the partition of the estate. The Court exercised this jurisdiction, settled the account and distributed and partitioned the estate. This would seem to be conclusive of all the questions raised by plaintiffs in error, applying to the proceedings on and after the 29th March, 1875, for any errors or irregularities in those proceedings as to the mode, manner and course of practice, would be mere errors, to be raised on an appeal, but not in the least affecting the decree when sought to be attacked collaterally. The points made against the decree, therefore, fall directly into the arms of the whole current of cases showing that any such errors do not affect the question of jurisdiction or the validity of the decree.

See cases *supra*.

The language of this Hon. Court in *Cooper* vs. *Reynolds*, 10 Wallace, 315, is conclusive of the case at bar, and is directly applicable here. The Court, speaking through Mr. Justice Miller, says:

"The record of this case is introduced collaterally as evidence of title in another suit, between other parties, and before a court which has no jurisdiction to reverse or set aside that judgment, however erroneous it may be. Nor can it disregard that judgment, or refuse to give it effect, on any other ground than a want of jurisdiction in the court which rendered it.

"It is of no avail, therefore, to show that there are errors in that record, unless they be such as prove that the court had no jurisdiction of the case, or that the judgment rendered was beyond its power. This principle has been often held by this court, and by all courts, and it takes rank as an axiom of the law. But that its applicability to the present case may be thoroughly understood, reference is made to the most important of the decided cases in this court and in the Supreme Court of Tennessee."

See the cases cited in note to 10 Wall., 316, and also *Hall* vs. *Law*, 102 U. S. R., 461, *Davis* vs. *Gaines*, 104 Id., 386; *Grignon's Lessee* vs. *Astor*, 2 How., 319; *Comstock* vs. *Crawford*, 3 Wall., 396.

The learned counsel for plaintiffs in error attempts to show that the IX Finding of the Court (Tr., pp. 8 and 9), on the subject of the publication of notice, was not sustained by the evidence. He asserts (p. 30, Brief): "It will be observed that there is no affidavit *for* publication of the notice, order to show cause, etc., in the record, and none in fact made."

Of course, no such inquiry as to the sufficiency of the evidence to sustain the finding of fact can be made here. But the bill of exceptions in the record shows that two affidavits of publication were offered in evidence, marked 2 and 3 (Tr., p. 43), and they will be found in the record at length. (Tr., pp. 45 and 46.)

As above shown, the Court under Sec. 1705 of the Code of Civil Procedure, ordered the number of publications to be made and the two affidavits show that such order was strictly complied with. But even if the Court upon that evidence, found the fact wrongly, it cannot be questioned collaterally in this suit.

Luco vs. *Commercial Bank*, 70 Cal., 342, and cases cited.

The evidence of Philip A. Roach (Tr., p. 45,) was competent to show, as it did show, the fact of publication of notice. Without that proof, the presumption was that due notice had been given, and the Court found that due notice had been given. What rule of law was violated in receiving this evidence? If it were an error, it could not injure the plaintiffs in error. Besides this, the proof by the affidavit of Schander rendered the evidence of Roach entirely superfluous. A publication once a week for four weeks, commencing February 18th, 1875, and ending March 18th,

1875, was necessarily and undoubtedly a publication once a week for four successive weeks.

There were but four weeks between the dates named, and once a week necessarily makes the publication once a week in four successive weeks.

But the whole record must be looked to for the purpose of ascertaining what as a whole appears. The case of *Hahn* vs. *Kelly*, 34 Cal., 408, was a case of service by publication of summons. The question of jurisdiction was involved.

The Court says:

"So in the case of service by publication—if the affidavit of the printer states that the summons was published one month, and yet the Court in its judgment states that it was published three, or that service has been had upon the defendant, *it will be presumed that other proof than that contained in the judgment roll was made, for not to so presume would be to deny to the record that absolute verity which must be accorded to it.*"

The opinion of the majority of this Hon. Court in *Pennoyer* vs. *Neff*, 95 U. S. R., 720 *et seq.*, is directly in point here, and it seems conclusive upon this point. There, as here, a judgment was offered in evidence and the proof by affidavit of service of summons by publication was involved. The Circuit Court of the United States for Oregon, "held that the judgment was invalid from defects in the affidavit upon which the order of publica-

tion was obtained, and in the affidavit by which the publication was proved." (p. 720.)

This Hon. Court speaking though Mr. Justice Field, said (p. 721):

"There is some difference of opinion among the members of this court as to the rulings upon these alleged defects. The majority are of opinion that inasmuch as the statute requires, for an order of publication, that certain facts shall appear by affidavit *to the satisfaction of the court or judge*, defects in such affidavit can only be taken advantage of on appeal, or by some other direct proceeding, and cannot be urged to impeach the judgment collaterally. * * * If, therefore, we were confined to the rulings of the court below upon the defects in the affidavits mentioned, we should be unable to uphold its decision."

There is nothing on the face of the record of the probate proceedings, to impeach the decree. The principle laid down in a series of cases well applies here. It is stated by the Supreme Court of Texas in *Murchison* vs. *White*, 54 Tex., 82, a case involving the validity of probate proceedings, as follows:

"It is believed that a careful analysis of the cases on this subject will show that, in a collateral proceeding, the only contingency in which the judgment of a domestic court of general jurisdiction, which has assumed to act in a case over which it might by law take jurisdiction of the subject matter and the person, can be questioned, is when the record shows *affirmatively* that its jurisdiction did not attach in the particular case. Freeman on Judgments, §§ 131-4; id., § 334; Hammond

v. Wilder, 23 Vt., 346, cited approvingly in Christmas *v.* Russell, 5 Wall., 307; Guilford *v.* Love, 49 Tex., 715; Fitch *v.* Boyer, 51 Tex., 337; Williams *v.* Ball, 52 Tex., 603."

The case of *Wright* vs. *Marsh*, 2 G. Greene's Iowa Rep., 108 *et seq.*, is instructive on the subject of publication of notice. The Court says :

"It is next objected that the court acquired no jurisdiction over the unknown owners in consequence of the defective publication. The record, it is true, does not disclose publication to the full extent required by the 9th section of the partition act. That section provides for the publication of notice for twelve weeks successively in some newspaper printed most convenient to the place where the court was held, and for four successive weeks in some newspaper printed at the seat of government. The twelve weeks publication appears to have been regularly made, but the record is silent as to the other, with the exception of a recital in the partition judgment that the petitioners by their counsel made proof of the publication of the notice previously ordered by the court. It appears then that proof of publication was before the court. It was considered, and the publication adjudged to be such as was required by law. It became a decision of that court upon a matter *coram judice* and whether made upon sufficient or insufficient proof, whether the court decided correctly or erroneously as to the adequacy of the publication, it cannot, in this proceeding, become a subject of inquiry. It was a question which that court alone had the original right to determine, and within its legitimate jurisdiction did decide that

the publication was sufficient. If erroneous, the party affected by it had his remedy; he could have had the decision revised and corrected on writ of error, and upon that writ only was the question subject to re-examination.

As the record comes from a court of general jurisdiction it did not become necessary to incorporate into it a copy of the notice or the proof of publication. Without these, the record would have been sufficiently authentic and conclusive. The authority of the court over the subject matter and over the parties, and the correctness of the proceedings would have been favored by all the force of legal presumption."

IV.

The sixth error assigned by the plaintiffs in error is: "Minors must be represented by guardian, general or special, and cannot be by an attorney."

(Plaintiffs' brief, pp. 4, 40.)

Sections 372 and 373 of the Code of Civil Procedure of California, relied on, have application only to "civil actions" and not "special proceedings." The Code is divided into *parts*. Part II is "of civil actions" and commences at Sec. 307 and ends at 1059. Sections 372 and 373 refer to the parties and modes of proceedings in "Actions" which is a different class of cases from "special proceedings" which embrace writs of "Mandate and Prohibition," "Proceedings in Probate Courts"

and a number of other special proceedings of a civil nature, extending from Sec. 1067 to 1821.

Secs. 20 to 23, of the code referred to, are as follows:

"§20. Judicial remedies are such as are administered by the courts of justice, or by judicial officers empowered for that purpose by the constitution and statutes of this State.

§21. These remedies are divided into two classes:

1. Actions; and

2. Special proceedings.

§22. An an action is an ordinary proceeding in a court of justice, by which one party prosecutes another, for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense.

§23. Every other remedy is a special proceeding."

It will be readily seen that Sections 372 and 373, relied on by plaintiffs' counsel, have no application to probate proceedings. On the contrary, Sec. 1718, C. C. P., directly applies to probate proceedings, being part of Title XI, extending from Section 1294 to 1809. That section is copied into the brief of plaintiffs in error and is as follows:

"Sec. 1718. At or before the hearing of petitions and contests for the probate of wills; for letters testamentary or of administration; for sales of real estate and confirmations thereof; settlements, partitions and distribution of estates; setting apart homesteads; and

all other proceedings where all the parties interested in the estate are required to be notified thereof, the court must appoint some competent attorney at law to represent, in all such proceedings, the devisees, legatees, heirs or creditors of the decedent, who are minors and have no general guardian in the county, or who are non-residents of the State; and may, if he deem it necessary, appoint an attorney to represent those interested who, though they are neither such minors or non-residents, are unrepresented. The order must specify the names of the parties for whom the attorney is appointed, who is thereby authorized to represent such parties in all such proceedings had subsequent to his appointment. The appearance of the attorney is sufficient proof of the service of the notice on the parties he is appointed to represent. The attorney may receive from the distributive shares of the estate set apart for the parties whom he represents, a fee not exceeding fifty dollars for his entire services; if there is no distribution of the estate, this fee must be paid out of the funds of the estate as necessary expenses of administration. If, for any cause, it becomes necessary, the Probate Court may substitute another attorney for the one first appointed, in which case the fee must be proportionately divided."

The sections of the Code relating to probate proceedings no where, that we can find, provide for guardians *ad litem*. Such guardians are limited to civil actions merely and no power to appoint such guardians in probate proceedings exists.

The Code in its provisions relating to probate

proceedings, instead of resorting to the circuitous mode of appointing a guardian *ad litem*, who would in his turn appoint a lawyer, at once in Sec. 1718 requires the Court to appoint in all important probate proceedings "some competent attorney at law to represent in all such proceedings" all devisees, heirs, etc., who are minors and have no general guardian. On the contest of a will in like manner the Court appoints attorneys to represent minors or absent persons—Sec. 1307, C. C. P.

It was in pursuance of Sec. 1718, C. C. P., that the Court appointed Chas. H. Sawyer, a "competent attorney at law," "to represent said minors Horace Hawes and Caroline C. Hawes, in the partition and distribution of said estate and all other proceedings where all of the parties in said estate or said heirs are required to be notified thereof."

(Tr., p. 19.)

This has been the general practice and has been sustained in other cases.

Estate of Gerraud, 36 Cal., 278.

This appointment was made after the Court had obtained jurisdiction, by the notice found by the Court to have been published according to law.

Had the appointment of a guardian *ad litem* been required, the failure to do so would have been a mere irregularity to be reached on an appeal but

not rendering the proceeding void when attacked collaterally.

Freeman on Judgments, § 151; *Simmons* vs. *McKay*, 5 Bush, Ky, 25; *Montgomery* vs. *Carlton*, 56 Tex., 365; *Beeler* vs. *Bullitt*, 3 A. K. Marshall, 280; *Barber* vs. *Taylor*, 9 Dana, 87; *Austin* vs. *Charlestown Female Seminary*, 8 Metc. (Mass.), 196: *Bloom* vs. *Burdick*, 1 Hill (N. Y.), 131; *Barber* vs. *Graves*, 18 Vt., 293.

The cases cited by counsel for plaintiffs in error (p. 42, brief,) will be found to have no application, the objections having been made in the proceedings at the time they were being prosecuted.

V.

It is also assigned as error "that the report of the Commissioner is defective, not containing the proceedings, but his conclusions."

(Plaintiffs' brief, p. 4.)

It might be enough to say that any irregularity in the proceedings in the matter referred to would be mere error, not now to be reviewed collaterally in this action, as shown by the authorities above referred to.

The cases cited by counsel upon this point may be divided into two classes, *first*, those not at all in point; *second*, those where the question arose directly in the case or on appeal and not collaterally.

The proceedings of the Commissioner were, however, in exact compliance with the law as will be at once seen on comparing his report, (Tr., pp. 25 *et seq.*) with Secs. 1683, 1684, C. C. P. In fact the Commissioner's report is in a marked degree technically exact and his proceedings show an accurate knowledge of his duties.

The cases cited by plaintiffs in error on this point will be found to have no application.

As to the right of the Court to partition the property in the mode adopted in this case, attention is respectfully called to the second proposition above in this brief.

VI.

It is also assigned as error that "no notice, by citation or otherwise, of making the partition, was given to the minors, or any guardian appointed for them."

(Brief of counsel for Plaintiffs in error, pp. 4 and 50.)

Sec. 1676, C. C. P., relied on in support of this assignment, must be read in connection with Sec. 1718, copied above in this brief. It no where appears in the record that the infant heirs had any general guardian, and therefore it is established that there was no such guardian. The Court, therefore, under Section 1718, C. C. P., appointed the attorney to represent the minors. The attor-

ney was duly notified by the Commissioner. (Tr., pp. 24, 25.) He not only appeared before the Commissioner (Tr., pp. 25, 26,) but before the Court in the partition proceedings. (p. 26.) Section 1718, C. C. P., expressly declares:

"*The appearance of the attorney is sufficient proof of the service of the notice on the parties he is appointed to represent.*"

(See Brief of plaintiffs in error, p. 41.)

Section 1676, however, if it applies, was complied with by the publication of the notice contained in the record. (Tr., pp. 18, 19.) It is moreover covered by Finding IX. (Tr., pp. 8, 9.)

Attention however is respectfully called to the fact that Sec. 1676 refers to the partition as directed by that Chapter of the Code. That Chapter, XI, commences at Sec. 1656. Partition here was made under Sec. 1634 which is in Chapter X, providing for a different kind of notice, and providing further that "on confirmation of the final account, *distribution and partition of the estate to all entitled thereto must be immediately had, without further notice or proceedings.*"

Here is a very general power and jurisdiction given, and the mode of its exercise is not provided for in the Code and could be proceeded with according to the sound discretion of the Court.

This is the rule laid down by the learned Surrogate of New York in an analogous case—*Campbell* vs. *Logan*, 2 Bradf. Sur. Rep., 93.

The Court here then had the discretion to adopt the mode of proceeding prescribed under Chap. XI, C. C. P., and of course no irregularity could affect the validity of the exercise of the general power.

But as observed above, the objection only goes to a question of error not to be reviewed collaterally in this action.

VII.

The ninth and last error relied on by plaintiffs in error is: A Probate Court, as such, cannot entertain and make partition without prejudice to rights of third persons, grantees of intestate."

(Plaintiffs' brief, pp. 4 & 53.)

The argument of the learned counsel on this head as well as the authorities cited by him, are drawn from the principles and cases applying to the usual partition in equity among all persons who own or claim any interest in the land, and not from any authority relating to partition in probate proceedings.

The partition in probate proceedings is only ancillary to the settlement of the estate, and is not intended to be made between any others than the heirs or devisees of the decedent, or those

claiming under them. The whole theory and object of the partition excludes parties other than those interested in the estate. It is a part of distribution and no more requires the bringing in of outside parties, than does distribution itself. It will be seen by Sec. 1675, C. C. P., (see appendix hereto,) that "when the estate, real or personal, assigned by the decree of distribution to two or more heirs, devisees, or legatees, is in common and undivided, and the respective shares are not seperated and distinguished, partition, or distribution, may be made," etc.

The parties interested, who are brought in under the machinery of the Code, are only the distributees, and the proceeding is only between them and only affects them. To obtain distribution, the notice only brings in distributees, and the decree of distribution, to all distributees in common, does not affect the interest of others than the distributees themselves. When partition follows, it merely changes the joint interests into several interests, and each holds his part in severalty just as he would have held the tract alloted to him had he been sole distributee thereof. The rights of others are not affected by the distribution or partition, for they are not parties to it.

In Freeman on Cotenancy & Partition, Sec. 553, the learned author says:

"§ 553. The parties to the proceeding must in-

clude all persons having any interest in the property derived from and under the decedent, and if any of such persons are not made parties, whether infants or adults, their interests cannot be affected by the partition. By property derived from and under the decedent, we mean such only as is acquired from him by descent, devise, or bequest, for if he, in his lifetime, conveyed the property or any part of it, the part so conveyed constitutes no part of his estate in probate, and cannot be there partitioned. If any of the heirs or devisees has conveyed his share, the conveyance may be recognized and protected, and the part conveyed set off to his grantee; and a conveyance made during the pendency of the proceedings does not impair the force of the partition. A known vendee must be made a party, or the proceedings will not affect his interests."

The author further says:

"As the proceeding is merely ancillary to the settlement of the estate of a decedent, it manifestly cannot involve any title not held by him, nor determine the title of one of the heirs who claims to be the sole owner of the property. Generally questions of title, so far as they can arise in probate proceedings, are disposed of before the commissioners are appointed to make partition. The decree of distribution conclusively fixes the share of each heir or devisee in the estate of his ancestor or testator, and the office of the proceedings for partition is merely to segregate the shares so fixed from each other, and transform them from undivided interests to estates in severalty."

In Sec. 558, the same author says:

"§ 558. Notice by the Commissioners. Before the Commissioners make the partition 'notice must be given to all persons interested in the partition, their guardians, agents, or attorneys, by the commissioners, of the time and place when and where they shall proceed to make partition.' We know of no decision determining the effect of an omission of this notice. It occurs to us, however, that this notice is not jurisdictional, because the parties in interest have already been brought into Court by the notice required to be given when the application is made for the appointment of commissioners. The failure to give this notice is unquestionably a very grave irregularity, justifying or even requiring that confirmation of the partition be refused, and that the commissioners be directed to begin *de novo*, by giving the proper notices. While the statute requires notice to be given to 'all persons interested,' we think these words are here used, and must be understood, in a qualified sense. The warrant of the commissioners is the decree of distribution and the order of their appointment. This decree is their sole guide. They have no authority to set off property to any person not named in such decree, nor in proportions variant from the shares or moieties there described. The persons named in the decree ought, therefore, to be deemed 'all the persons interested in the partition' and a notice to them sufficient to sustain the subsequent proceedings of the commissioners."

These views of Mr. Freeman read in connection

with the sections of the Code referred to, seem to be unanswerable.

We also respectfully call attention to the following authorities:

"It is well settled that a decree or judgment in partition has no other effect than to sever the unity of possession, and does not vest in either of the co-tenants any new or additional title. After the partition each had precisely the same title which he had before; but that which before was a joint possession was converted into a several one. If this be the only effect of a judgment in partition, I do not perceive how an amicable partition effected by an interchange of deeds could produce a different result."

Wade vs. *Deray*, 50 Cal., 380;
Mound City L. & W. A., vs. *Philip*, 64 Id., 495.

In decrees of partition in the Probate Court, "no deed of release of their several proportions by one heir or devisee to another is required, as the adjudication of the Court, accepting and affirming the doings of the Commissioners appointed to make partition, is binding and conclusive."

1 Washburn on Real Property, p. 586 [450]; Freeman on Cotenancy & Partition, Sec. 427; *Freeman* vs. *Rahm*, 58 Cal., 114; *Wright* vs. *Marsh*, 2 G. Greene's (Iowa) R., 110; 1 Story's Eq. Juris., Sec. 652; *In re Garraud*, 36 Cal., 277.

CONCLUSION.

It is respectfully submitted that the following propositions are established by the statutes and authorities above cited:

1st. That the Probate Court had the power and jurisdiction to partition the estate of the decedent, Horace Hawes, Sr., to his heirs on the settlement of the final account and distribution;

2d. That Mrs. Caroline Hawes, widow of deceased, was sufficiently interested both as heir and administratrix, to file a petition for settlement of her final account and for distribution and partition, under Section 1634 of the Code of Civil Procedure;

3d. That all notices required by law to all interested parties were duly given;

4th. That the minors were duly represented by the only guardian *ad litem* known to the probate code—that is, an attorney at law duly appointed;

5th. That the proceedings of the Commissioner were in accordance with his duties as prescribed by law;

6th. That the action of the Probate Court was in accordance with the Code;

7th. That the Court had jurisdiction in the premises, and that its proceedings cannot be attacked in this case collaterally;

8th. That there is no error in the record.

The conclusion of the brief of the learned counsel for Plaintiffs in error has been read with regret. With his feeling of disappointment at the unsuccessful result of some other litigation in which he has been engaged against the defendant in error here, neither this Hon. Court nor the defendant's counsel have anything to do, as it does not bear on the question involved here. If set forth as an apology for being engaged now, in an attack upon the regularity and validity of the proceedings in the Probate Court, which were the work of his own creation, it need only be said that the Defendant in error places no stress upon that fact, but relies for an affirmance of the judgment upon the substantial principles of law and of right herein above set forth.

To avoid a misapprehension of the case referred to—*Belcher* vs. *Chambers*, 53 Cal., 635—it need only be remarked that in that case the Supreme Court of California merely conformed to the decisions of this Hon. Court in *Galpin* vs. *Page*, 18 Wall., 336, and *Pennoyer* vs. *Neff*, 95 U. S., 714, in which it was held, in the absence of the attachment of any property:

"A personal judgment is without any validity, if it be rendered by a State court in an action upon a money-demand against a non-resident of the State, who was served by a publication of summons, but upon whom no personal service of process within the

State was made, and who did not appear; and no title to property passes by a sale under an execution issued upon such a judgment."

That any number of land titles in California ever depended upon the validity of mere money judgments rendered against non-residents, without other service of process than publication, and in the absence of any previous seizure of property by attachment, is information for the first time obtained from the learned counsel's brief.

March, 1888.

Respectfully submitted,

SAMUEL M. WILSON,

Of Counsel for Defendant in Error.

APPENDIX.

Sections of the Code of Civil Procedure of California in force in the year 1875, when the estate of Horace Hawes, Sr., was distributed and partitioned.

1633. When any account is rendered for settlement, the Court or Judge must appoint a day for the settlement thereof; the Clerk must thereupon give notice thereof, by causing notices to be posted in at least three public places in the county, setting forth the name of the estate, the executor or administrator, and the day appointed for the settlement of the account, which must be on some day of a term of the Court. The Court or Probate Judge may order such further notice to be given as may be proper.

1634. If the account mentioned in the preceding section be for a final settlement, and the estate be ready for distribution, the notice of the settlement must state those facts, and must be served, published, or waived in the same manner as provided in section 1539 of this Code relating to sales of property; and, on confirmation of the final account, distribution and partition of the estate to all entitled thereto may be immediately had, with-

out further notice or proceedings. If, from any cause, the hearing of the account or the partition and distribution be postponed, the order postponing the same to a day certain is notice to all persons interested therein.

1635. On the day appointed, or any subsequent day to which the hearing may be postponed by the Court, any person interested in the estate may appear and file his exceptions in writing to the account, and contest the same.

1665. Upon the final settlement of the accounts of the executor or administrator, or at any subsequent time, upon the application of the executor or administrator, or of any heir, legatee, or devisee, the Court must proceed to distribute the residue of the estate in the hands of the executor or administrator, if any, among the persons who by law are entitled thereto; and if the decedent has left a surviving child, and the issue of other children, and any of them, before the close of administration, have died while under age and not having been married, no administration on such deceased child's estate is necessary, but all the estate which such deceased child was entitled to by inheritance must, without administration, be distributed to the other heirs at law. A statement of any receipts and disbursements of the executor or administrator, since the rendition of his final

accounts, must be reported and filed at the time of making such distribution, and a settlement thereof, together with an estimate of the expenses of closing the estate, must be made by the Court and included in the order or decree; or the Court or Judge may order notice of the settlement of such supplementary account, and refer the same as in other cases of the settlement of accounts.

1666. In the order or decree, the Court must name the persons and the proportions or parts to which each shall be entitled, and such persons may demand, sue for, and recover their respective shares from the executor or administrator, or any person having the same in possession. Such order or decree is conclusive as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside, or modified on appeal.

1668. The order or decree may be made on the petition of the executor or administrator, or of any person interested in the estate. Notice of the application must be given by posting or publication, as the Court may direct, and for such time as may be ordered. If partition be applied for, as provided in this chapter, the decree of distribution shall not divest the Court of jurisdiction to order partition, unless the estate is finally closed.

1675. When the estate, real or personal, assigned by the decree of distribution to two or more

heirs, devisees, or legatees, is in common and undivided, and the respective shares are not separated and distinguished, partition, or distribution, may be made by three disinterested persons, to be appointed Commissioners for that purpose by the Probate Court or Judge, who must be duly sworn to the faithful discharge of their duties. A certified copy of the order of their appointment, and of the order or decree assigning and distributing the estate, must be issued to them as their warrant, and their oath must be indorsed thereon. Upon consent of the parties, or when the Court deems it proper and just, it is sufficient to appoint one Commissioner only, who has the same authority and is governed by the same rules as if three were appointed.

1676. Such partition may be ordered and had in the Probate Court, on the petition of any person interested. But before Commissioners are appointed, or partition ordered by the Probate Court as directed in this Chapter, notice thereof must be given to all persons interested, who reside in this State, or to their guardians, and to the agents, attorneys, or guardians, if any in this State, of such as reside out of the State, either personally or by public notice, as the Probate Court may direct. The petition may be filed, attorneys, guardians, and agents appointed, and notice given, at any time before the order or decree of distribution, but

the Commissioners must not be appointed until the order or decree is made distributing the estate.

1677. If the real estate is in different counties, the Probate Court may, if deemed proper, appoint a Commissioner for all, or different Commissioners for each county. The estate in each county must be divided separately among the heirs, devisees, or legatees, as if there was no other estate to be divided, but the Commissioner first appointed must, unless otherwise directed by the Probate Court, make division of such real estate, wherever situated within this State.

1678. Partition or distribution of the real estate may be made as provided in this Chapter, although some of the original heirs, legatees, or devisees may have conveyed their shares to other persons, and such shares must be assigned to the person holding the same, in the same manner as they otherwise would have been to such heirs, legatees, or devisees.

1679. When both distribution and partition are made, the several shares in the real and personal estate must be set out to each individual in proportion to his right, by metes and bounds, or description, so that the same can be easily distinguished, unless two or more of the parties interested consent to have their shares set out so as to be held by them in common and undivided.

1680. When the real estate cannot be divided without prejudice or inconvenience to the owners, the Probate Court may assign the whole to one or more of the parties entitled to share therein who will accept it, always preferring the males to the females, and among children preferring the elder to the younger. The parties accepting the whole must pay to the other parties interested their just proportion of the true value thereof, or secure the same to their satisfaction, or, in case of the minority of such party, then to the satisfaction of his guardian, and the true value of the estate must be ascertained and reported by the Commissioners. When the Commissioners appointed to make partition are of the opinion that the real estate cannot be divided without prejudice or inconvenience to the owners, they must so report to the Court, and recommend that the whole be assigned as herein provided, and must find and report the true value of such real estate. On filing the report of the Commissioners, and on making or securing the the payment as before provided, the Court, if it appears just and proper, must confirm the report, and thereupon the assignment is complete, and the title to the whole of such real estate vests in the person to whom the same is so assigned.

1681. When any tract of land or tenement is of greater value than any one's share in the estate to be divided, and cannot be divided without in-

jury to the same, it may be set off by the Commissioners appointed to make partition to any of the parties who will accept it, giving preference as prescribed in the preceding section. The party accepting must pay or secure to the others such sums as the Commissioners shall award to make the partition equal, and the Commissioners must make their award accordingly; but such partition must not be established by the Court until the sums awarded are paid to the parties entitled to the same, or secured to their satisfaction.

1682. When it appears to the Court, from the Commissioners' report, that it cannot otherwise be fairly divided, and should be sold, the Court may order the sale of the whole or any part of the estate, real or personal, by the executor or administrator, or by a Commissioner appointed for that purpose, and the proceeds distributed. The sale must be conducted, reported, and confirmed in the same manner and under the same requirements provided in Article IV, Chapter VII of this Title.

1683. Before any partition is made or any estate divided, as provided in this Chapter, notice must be given to all persons interested in the partition, their guardians, agents, or attorneys, by the Commissioners, of the time and place when and where they shall proceed to make partition. The Commissioners may take testimony, order surveys, and take such other steps as may be necessary to